IN THE
SUPREME COURT OF THE UNITED STATES

No. 77-560

October Term, 1977

JO ANN EVANS GARDNER,

Petitioner,

v.

WESTINGHOUSE BROADCASTING COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT N. HACKETT

JOAN P. FELDMAN

BASKIN, BOREMAN, WILNER, SACHS,
GONDELMAN & CRAIG

10th Floor Frick Building
Pittsburgh, Pennsylvania 15219

Counsel for Petitioner,
Jo Ann Evans Gardner

INDEX

Index

TABLE OF CITATIONS

CASES

Table of Citations

Table of Citations

STATUTES

MISCELLANEOUS AUTHORITIES

Table of Citations

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Jo Ann Evans Gardner, Petitioner herein, prays this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit which was entered in this case on June 6, 1977.

Statute Involved

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra) has not yet been officially reported. The opinion is set forth in the Appendix, as is the Court of Appeals' order denying rehearing and the Opinion Sur Denial of Petition for Rehearing. (App. B, infra) The opinion of the district court has not been officially reported, and is set forth in the Appendix (App. C, infra)

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1977. Jo Ann Evans Gardner's timely petition for rehearing was denied by the Court of Appeals on July 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

This case involves the interpretation and application of the Act of June 25, 1948, c.646, 62 Stat. 929, 28 U.S.C. § 1292(a)(1), which is set forth in the Appendix. (App. D, infra)

Question Presented

QUESTION PRESENTED

Whether the denial of class action certification in an employment discrimination case where class-wide injunctive relief is requested is immediately appealable as an interlocutory order refusing an injunction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE CASE

The instant action was commenced by Jo Ann Evans Gardner (hereinafter Gardner) as a class action seeking declaratory, injunctive, and consequent monetary damages to redress Westinghouse Broadcasting Company's (hereinafter Westinghouse's) denial of equal employment opportunity to females. Jurisdiction was alleged pursuant to Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq, and Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania.

Gardner, an unsuccessful applicant for employment as a talk-show host with one of Westinghouse's radio stations located in Pittsburgh, Pennsylvania, sought to represent all females adversely affected by Westinghouse's claimed company-wide policy of discrimination against females on the basis of their sex by, inter alia,

failing to hire or promote them to executive, managerial, professional, or technical positions. Gardner's complaint reveals that she claimed authority to represent the class by virtue of Fed. R. Civ. P. 23(b)(2). The complaint requested a permanent injunction on behalf of the class, curtailing all of Westinghouse's unlawful employment practices which adversely affect the class of females.

In accordance with the requirements of Fed. R. Civ. P. 23(c)(1) and Local Rule 34(c) of the Rules of Court of the United States District Court for the Western District of Pennsylvania, Gardner filed a Motion to Determine a Class within ninety (90) days of the filing of the complaint. Gardner also propounded interrogatories to Westinghouse in an effort to enable her to define the scope of the class. Westinghouse objected to all interrogatories which sought information as to any of its radio stations apart from Station KDKA in Pittsburgh.[1] Gardner filed a Motion to Compel Discovery in order to obtain complete answers to the interrogatories requesting information as to Westinghouse's other radio stations.

By Memorandum and Order dated February 3, 1976, the District Court denied both the Motion to Determine a

1. Westinghouse owns and operates seven (7) radio stations throughout the United States.

Class and the Motion to Compel Discovery. The ruling on the latter motion was the direct result of the decision to deny class certification. Denial of class status was predicated on the District Court's view that the requirements of Fed. R. Civ. P. 23(a)(2), (a)(3), and (a)(4) were not met. (App. C, infra at 38a - 39a)

Thereupon, Gardner, on her own behalf and on behalf of the class she sought to represent, appealed the order refusing class certification to the United States Court of Appeals for the Third Circuit. Westinghouse filed a Motion to Dismiss Appeal for Lack of Jurisdiction, which Motion was granted by the Third Circuit.

In support of her right to maintain this appeal, Gardner argued, inter alia, that the denial of class certification amounted to the effective denial of the broad injunctive relief sought on behalf of the class and constituted an order of immediate and irreparable consequences; thus it was appealable pursuant to 28 U.S.C. § 1292(a)(1).

The Third Circuit rejected Gardner's argument, stating that denial of class certification does not constitute the absolute refusal of an injunction and that no immediate or irreparable consequences flow from a

postponement of review. (App. A, infra at 5a - 10a)[2]

Gardner's timely Petition for Rehearing was denied on July 22, 1977.[3]

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' Dismissal of Gardner's Appeal Conflicts With the Holdings of the Majority of Courts of Appeals.

This Court should grant the instant Petition because the Court of Appeals has decided an important question of federal law in a manner which conflicts with the holdings of the majority of courts of appeal which have considered the application of § 28 U.S.C. § 1292(a)(1) to interlocutory appeals of disctrict court orders refusing to grant class action certification in civil rights cases.

The Act of June 25, 1948, c. 646, 62 Stat. 929, 28

2. Chief Judge Seitz filed a concurring opinion, in which he determined that should Gardner obtain all of the individual relief she seeks, she would still have standing to appeal the class action denial following final judgment. (App. A. infra at 10a - 21a)

3. Judge Gibbons joined by Judge Adams strongly dissented from the Third Circuit's denial of Gardner's Petition for Rehearing. (App. B, infra at 24a - 33a)

U.S.C. § 1292(a)(1), upon which Gardner grounded her right to appeallate review, provides as follows:

> "§ 1292. Interlocutory decisions
> (a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving, injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court. . ."

a. The Third Circuit's Decision

While recognizing the significance of the class action determinination for the subsequent course of the litigation and acknowledging the class representative's interest in early appellate review, the Third Circuit nonetheless held that a class certificstion decision, unlike a decision on an application for an injunction, is:

> ". . . wholly procedural. It is normally within the discretion of the trial court; [citation omitted] it may be conditional, subject to alteration or amendment prior to final judgment, F.R. Civ. P. 23(c)(1); and it does not implicate the merits of the case at all. If, after judgment on the merits, the relief granted is deemed unsatisfactory, the question of class status is fully reviewable. The delay

involved is the same delay that accompanies review of all interlocutory procedural rulings in a case, and the delay in no way diminishes the power of the court upon review to afford full relief.

"We perceive no irremediable consequences flowing from a postponement of review."

* * * * *

"We understand the conceptual basis of the theory advanced by Ms. Gardner. She argues that the ultimate injunctive relief in a successful action may be narrower if class status is denied than if class status were granted. But this effect will occur, if at all, only after a decision on the mertis of the prayer for injunctive relief. Prior to that time, an order denying a class certification does not 'touch on the merits of the claim' nor does it have 'final and irreparable effects on the rights of the parties' . . ." (App. A at 6a - 7a, 9a)[4]

4. In so holding, the Third Circuit clearly stated that it was deliberately closing an avenue of appeal that had heretofore been available by virtue of Hackett v. General Host Corp., 455 F.2d 618 (3rd Cir. 1972):

> "Secondly, Eisen is not needed to afford interlocutory appellate review in those cases in which the refusal to grant class action designation amounts to a denial of apreliminary injunction broader than would be appropriate for individual relief. 28 U.S.C. § 1292(a)(1) [citations omitted] This category of interlocutory appeals is adequate, we think, to protect against most district court inhospitability to class action litigation involving civil rights. . . ." Id., at 622.

b. Conflicting Decisions in Other Circuits

The Third Circuit recognized that its decision conflicted with the decisions of other circuits on the question of the immediate reviewability of class action denials. In so holding, the Third Circuit expressly allied itself with the Second and the District of Columbia Circuits, which have rejected the proposition that a class action determination is appealable pursuant to 28 U.S.C. § 1292(a)(1). Williams v. Wallace Silversmiths, Inc., ___ F.2d ___, 13 E.P.D. ¶ 11,556 (2nd Cir. 1977); City of New York v. International Pipe and Ceramics Corp., 410 F.2d 295 (2nd Cir. 1969); Williams v. Mumford, 511 F.2d 363 (D.C. Cir. 1975), cert. denied, 423 U.S. 828 (1975).

The First, Fourth, Fifth, Seventh and Ninth Circuits have held that orders refusing to certify class actions are appealable under 28 U.S.C. § 1292(a)(1), in cases where broad injunctive relief is sought against violations of rights guaranteed by Title VII of the Civil Rights Act of 1964 or by the Constitution of the United States of America. Yaffee v. Powers, 454 F.2d 1362 (1st Cir. 1972); Brunson v. Board of Trustees of School District No. 1, 311 F.2d 107 (4th Cir. 1963); cert. denied, 373U.S. 933 (1963); Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975); Jenkins v. Blue Cross Mutual Hospital Insurance, Inc., 522F.2d 1235 (7th Cir. 1975); Price v. Lucky Stores, 501 F.2d 1177 (9th

Cir. 1974); Inmates of San Diego County Jail v. Duffy, 528 F.2d 954 (9th Cir. 1975).[5]

The theory which emerges from the above cases is that where "the substantial effect" of the court's order denying class action status "is to narrow considerably the scope of any possible injunctive relief in the event plaintiffs ultimately prevail on the merits . . . the order is appealable as a denial of the broad injunctive relief sought." Yaffee v. Powers, supra, at 1364-1365.[6]

5. Although they did not directly involve class action certification orders, the following cases permitted appeals from orders which effectively limit injunctive relief: Melendez v. Singer Friden Corp., 529 F.2d 321 (10th Cir. 1976); Abercrombie and Fitch Co. v. Hunting World, Inc. 461 F.2d 1040 (2nd Cir. 1972); Build of Buffalo v. Sedita, 441 F.2d 284 (2nd Cir. 1971); Spangler v. U.S., 415 F.2d 1242 (9th Cir. 1967). See, generally, Comment, Appealability of Class Action Determinations, 44 Ford. L. Rev. 548 (1975);Note, Interlocutory Appeal From Orders Striking Class Allegations, 70 Colum. L. Rev. 1292 (1970)

The Seventh Circuit has sanctioned an appeal from an order granting class certification, where a preliminary injunction is requested and the class action decision controls the scope of relief thus obtained. Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976).

6. The Eighth Circuit has expressly refused to adopt or reject this theory of appealability for class action orders. Johnson v. Nekoosa - Edwards Paper Co., ____ F.2d ____, 14 F.E.P. Cases 1658 (8th Cir. 1977); Donaldson v. Pillsbury Co., 529 F.2d 979 (8th Cir. 1976)

The Fourth Circuit has delineated the conditions under which a denial of a class action will be appealable under 28 U.S.C. § 1292(a)(1), i.e., where the "class action bears a symbiotic relationship to the frustration of relief. . ." Jones v. Diamond, supra, at 1095:

> "The first, and perhaps obvious requirement is that the plaintiff's prayer for an injunction must constitute the heart of the relief he seeks. The desired injunction must be capable of resolving the substantive issues of the claim, it cannot merely maintain the status quo during the litigation. . ." [citations omitted]
>
> "The second requirement for appealability is that the practical result of the order denying the proposed class must be to deny the requested broad injunction . . . .We therefore hold that where the denial of permission to proceed as a class is synonymous with the denial of the broad injunctive relief sought on the merits, and where the injunction is the primary purpose of the suit, the order is appealable under § 1292(a)(1) as an order 'refusing' an injunction." Id., at 1095-1097 (emphasis added).[7]

7. While Jones v. Diamond, supra was a case where both a preliminary and a permanent injunction was sought, the absence of the request for a preliminary injunction here does not affect appealability. Indeed, in Rodgers v. United States Steel Corp., 541 F.2d 365 (3rd Cir. 1976), the Third Circuit rejected the attempt to use a pro forma preliminary injunction to convert an order not final under 28 U.S.C. § 1291 into one arguably appealable pursuant to 28 U.S.C. § 1292(a)(1)

This Court in Switzerland Cheese Association,

(footnote 7 continued next page)

Reasons for Granting the Writ

7. (Continued)

Inc. v. E. Hornes' Market, Inc., 385 U.S. 23 (1966) declined to hold that an interlocutory order did not include an order denying a permanent injunction. Citing Switzerland Cheese, the United States Court of Appeals for the Fifth Circuit held that an order denying a permanent injunction was appealable pursuant to 28 U.S.C. § 1292(a)(1). Equal Employment Opportunity Commission v. International Longshoreman's Association, 511 F.2d 273 (5th Cir. 1975), cert. denied, 423 U.S. 994 (1975)

Further, Yaffee v. Powers, supra; Price v. Lucky Stores, supra; and Brunson v. Board of Trustees of School District No. 1, supra, held class action denials to be appealable where only permanent injunctive relief was requested.

Reasons for Granting the Writ

c. The District Court Decision Effectively Denied the Broad Injunctive Relief Sought

Thus, it is clear that there is substantial disagreement with the basic premise of the Third Circuit's decision; that the denial of class action certification does not diminish the power of a court to afford full relief at a later stage in the proceedings. As Gardner's complaint makes clear, the heart of the relief she seeks is a broad injunction, curtailing all of Westinghouse's policies and actions which adversely affect females. Such an injunction would resolve the substantive issues presented by her claim of a pervasive pattern of sex discrimination which permeates all of Westinghouse's employment practices. Jones v. Diamond, supra. However, the District Court's refusal to grant class action status effectively and finally precludes Gardner from obtaining the broad remedy requested. Left only with her individual action, Gardner will be limited at the trial on the merits to presenting evidence of employment practices which affected her personally. Consequently, she will only be able to obtain relief tailored to her individual complaint: Westinghouse's failure to hire her. See, Brunson v. Board of Trustees of School District No. 1, supra. The district court's denial of the Motion to Compel Discovery, which resulted from the adverse ruling on the Motion to Determine a Class Action, is further proof that Gardner will be precluded from

gathering or presenting at trial any evidence concerning Westinghouse's employment practices at its facilities outside of the Pittsburgh area. Obviously, no injunctive remedy could be granted which would curtail Westinghouse's claimed system-wide discrimination. The district court's order is not conditional, and totally forecloses the possibility that absent class members, especially those employed outside of the Pittsburgh area, can obtain any relief whatsoever.

Gardner is not litigating a company-wide policy, such as a "no-marriage" rule where an injunction in favor of the named plaintiff will perforce operate to the benefit of all employees. See e.g., Sprogis v. United Airlines, Inc. 444 F.2d 1194 (7th Cir. 1974). Rather, this case falls within the rule established by Nance v. Union Carbide Corp., 540 F.2d 718 (4th Cir. 1976) and Danner v. Phillips Petroleum Co., 447 F.2d 159 (5th Cir. 1971), that absent compliance with the requirements of Fed. R. Civ. P. 23 and certification thereunder, class-wide relief cannot be obtained. Nance and Danner demonstrate that the Third Circuit's assumption that Gardner could, after the trial on the merits of her individual case, still obtain all of the relief detailed in the complaint is erroneous.

d. Immediate Irreparable Consequences Flow From the Denial of Class Status

Although the Third Circuit found that no immediate, irreparable consequences result from the postponement of review of class action orders, the narrowing of the permanent injunctive relief which can be obtained by Gardner is but one example of the consequences attendant upon and the refusal to grant class status. District Court inhospitability to class actions, particularly in civil rights cases, is exacerbated by the non-reviewability of denials of class certification until after the individual case on the merits has been concluded, which may be months or even years after an erroneous order is issued. To allow such orders to stand as precedent, unreviewed by an appellate court, until the conclusion of the case on the merits has an undoubted chilling effect on the class action device and on civil rights cases generally. Williams v. Mumford, supra, (Opinion of Judge Spottswood W. Robinson on application for rehearing before the court en banc, 511 F.2d at 371-372)[8]

As is indicated by Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975), the effect of class action denials on the further conduct of the case is immediate

8. Judge Gibbons expressed much the same sentiments in his dissent from the denial of the Petition for Rehearing in this case. (See App. B, at 25a,32a , infra.)

and irreparable. The scope of discovery and of evidence at trial is determined by whether or not the case proceeds as a class action. Class action denial ultimately leads as it did in the case at bar, to a narrowing of discovery and to a focus at trial on the merits solely with the individual's claim.

The case focus shifts to an unwavering concern with the named plaintiff's individual claim. If the appealability of orders refusing to certify a class action must await the conclusion of the trial of the individual plaintiff's claims on the merits, undue delay and waste of the time of both judge and counsel will result. If the class action denial is reversed on appeal, the case will have to be retried, following an additional period of time for discovery. Such was the result in Rich v. Martin Marietta, supra, a result which contravenes the principles underlying Fed. R. Civ. P. 23.

The denial of a motion to determine a class action in an employment discrimination case where a broad injunction is sought has the immediate effect of narrowing the relief which can ultimately be obtained by the named plaintiff. The majority of circuits within the federal appellate system have recognized the irreparable harm resulting thereby, and have held such orders appealable pursuant to 28 U.S.C. § 1292(a)(1). The question of the

interlocutory appealability of class action determinations is of the utmost importance to all litigants involved in class actions, and particularly to those litigants seeking to certify class actions in civil rights cases. Since the circuits are divided on this issue, this Court should resolve the conflict. It is, therefore, both appropriate and necessary that this Court grant the instant Petition for Writ of Certiorari.

2. The Third Circuit's Interpretation of 28 U.S.C. § 1292(a)(1) Conflicts With the Prior Holdings of This Court.

This Court should grant the instant Petition because the Court of Appeals misapplied this Court's decision in Switzerland Cheese, Inc. v. E. Hornes' Market, Inc., 385 U.S. 23 (1966) and Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 249 (1955).[9]

The Third Circuit erred in its conclusion that the denial of a class action does not amount to the denial of

9. While not mentioned in the Third Circuit's opinion, Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188 (1942); Enelow v. New York Life Insurance Co., 293 U.S. 379 (1935); and General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430 (1932) support Gardner's position herein.

Reasons for Granting the Writ

an injunction, a conclusion which rested on its view of Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., 385 U.S. 23 (1966). This Court therein held that the denial of a motion for summary judgment in a case where injunctive relief, both temporary and permanent, was sought, was strictly a procedural pre-trial order which did not settle or tentatively decide anything about the merits of the claim. Id. at 25. Clearly, however, the order denying class action status herein is not merely a pre-trial order that advances the case to trial.[10] The order definitely narrows the scope of relief which Gardner can ultimately obtain; and thus effectively denies the broad permanent injunction which is the heart of the relief requested in order to resolve the substantive issues of the case.

In Baltimore Contractors, Inc., this Court analyzed the legislative history of 28 U.S.C. § 1292(a)(1) as follows:

> "No discussion of the underlying reasons for modifying the rule of finality appears in the legislative history, although the changes seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequence." Id., at 181.

10. As the First Circuit noted in Lamphere v. Brown University, 553 F.2d 714 (1st Cir. 1977) decisions on class certification often implicate the merits of the underlying substantive claims.

Reasons for Granting the Writ

The order refusing to certify the class herein unmistakably is an interlocutory order of serious, irreparable consequence. As this Court has recently indicated in East Texas Motor Freight System Inc. v. Rodriguez, ____ U.S. ____, 97 S. Ct. 1891 (1977), the representative plaintiff must be a member of the class he or she seeks to represent at the time the class is certified. Where, as here, a class action is formally denied by the district court, and the individual plaintiff loses his or her individual case on the merits, this Court's ruling in East Texas Motor Freight System, Inc. suggests that no class could be subsequently certified, at least by the original class representative, despite the reversal of a wholly erroneous district court decision on the maintainability of the case as a class action.

Indeed, it is probable that an appeal challenging the merits of a district court order denying class certification brought by a class representative following the loss of his or her individual case would be dismissed, as not presenting the appellate court with a concrete case or controversy, in violation of Article III of the Constitution of the United States. See, East Texas Motor Freight System, Inc. v. Rodriguez, supra; Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), Sosna v. Iowa, 419 U.S. 393 (1975), Board of School Commissioners of the City of Indianapolis

v. Jacob, 420 U.S. 128 (1975).[11]

Moreover, this Court's recent decision in United Airlines v. McDonald, ____ U.S. ____ 97 S. Ct. 2464 (1977) suggests that the statute of limitations will run against the individual Title VII claims of putative class members, when class status is denied by the district court and affirmed on appeal after an intervening trial on the merits.[12] The limited tolling of the statute of limitations for putative class members allowed in United Airlines, Inc. is for the purpose of allowing them to intervene for the purpose of obtaining review over the lower court's allegedly improper class action decision only. Thus this Court's holding in American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) still prevents members of the

11. At least one appellate court has refused to allow an appeal to correct errors in class certification after the representative plaintiff's claim became moot. Napier v. Gertrude, 542 F.2d 825 (8th Cir. 1976); Contra, Satterwhite v. City of Greenville, Texas, ____ F.2d ____, 14 E.P.D. ¶7773 (5th Cir. 1977) which contravenes this Court's decision in East Texas Motor Freight System, Inc.

12. This Court noted that the denial of class action certification in United Airlines, Inc. could not be appealed as of right in the Seventh Circuit. Id., 97 S. Ct. at 2467 n.4. However, the plaintiffs therein did not attempt to invoke 28 U.S.C. § 1292(a)(1). See, Jenkins v. Blue Cross Mutual Hospital Insurance, Inc., supra.

Gardner class from instituting individual suits to litigate their individual claims at the conclusion of Gardner's appeal on the merits of the denial of her individual case.

Even if the individual class members' rights to present their Title VII claims can be said to be held in abeyance until the conclusion of all of the appeals which Gardner can take as an individual, ignorance of the action and failure to exhaust administrative remedies will result in the loss of many potential claims. Clearly, the member of a class action under Title VII need not exhaust his or her administrative remedies, but the class representative or plaintiff in an individual action clearly must do so prior to maintaining a lawsuit. Oatis v. Crown Zellerbach Corp., 398 F. 2d 496 (5th Cir. 1968).

The above serious and irreparable consequences of an order denying class certification can only be avoided by immediate appealability pursuant to 28 U.S.C. § 1292(a)(1).

Gardner respectfully submits that the Third Circuit's erroneous analysis of 28 U.S.C. § 1292(a)(1) and of the holdings of this Court require the granting of the instant Petition.

Conclusion

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT N. HACKETT

JOAN P. FELDMAN

BASKIN, BOREMAN, WILNER, SACHS, GONDELMAN & CRAIG

10th Floor Frick Building
Pittsburgh, Pennsylvania 15219

Counsel for Petitioner,
Jo Ann Evans Gardner

IN THE
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No. _____

October Term, 1977

JO ANN EVANS GARDNER,

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v.

WESTINGHOUSE BROADCASTING COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 76-1410

JO-ANN EVANS GARDNER

v.

WESTINGHOUSE BROADCASTING COMPANY,

Jo Ann Evans Gardner, on her own behalf as a representative of the class and on behalf of the class that she seeks to represent,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil Action 75-614)

Submitted Under Third Circuit Rule 12(6)

March 28, 1977

Before: SEITZ, *Chief Judge*, and ALDISERT and HUNTER, *Circuit Judges*.

Robert N. Hackett, Esq.
Joan P. Feldman, Esq.
Baskin, Boreman, Wilner, Sachs, Gondelman & Craig
10th Floor Frick Building
Pittsburgh, Pennsylvania 15219

Counsel for Appellant

Wendell G. Freeland, Esq.
Richard F. Kronz, Esq.
Freeland & Kronz
409 Plaza Building
Pittsburgh, Pennsylvania 15219

Counsel for Appellee

OPINION OF THE COURT

(Filed June 6, 1977)

ALDISERT, *Circuit Judge.*

The question is whether a denial of a class certification can be immediately appealed under 28 U.S.C. § 1292 (a)(1) [1] on the theory that the denial amounts to the denial of an injunction. The circuits are divided on the question. Although the theory of § 1292(a)(1) appealability has been mentioned in dictum in several opinions in this circuit, especially *Hackett v. General Host Corp.*, 455 F.2d 618 (3d Cir. 1972), we have never applied it to permit such an appeal, nor have we ever directly adjudicated its validity. Upon consideration, we believe that the theory is unworkable as an exception to the general rule in this circuit limiting the appealability of class determinations and that it is unwarranted in its expansion of the narrow purposes of § 1292(a)(1). Accordingly, we reject the theory of § 1292(a)(1) appealability and grant appellee's motion to dismiss the appeal.

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1. § *1292. Interlocutory decisions*

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

I.

This civil rights action was commenced by the plaintiff, Jo Ann Evans Gardner, on her own behalf and on behalf of a class of similarly situated women alleging sex discrimination in the employment practices of the defendant, Westinghouse Broadcasting Company. The complaint sought injunctive and monetary relief, and attorney's fees. Shortly after commencing the action, Ms. Gardner moved for a class certification under F.R. Civ. P. 23(b)(2). Interrogatories were served. After Westinghouse failed to respond fully to certain interrogatories, Ms. Gardner moved to compel discovery. After oral argument, the district court denied both motions, ruling that there were no questions of law or fact common to the class, that plaintiff's claim was not typical, and that there was no need to consider the discovery motion in light of the denial of class status. No further rulings were made. Without obtaining a certificate under 28 U.S.C. § 1292(b),[2] Ms. Gardner filed an appeal from the denial of her class action motion asserting 28 U.S.C. § 1292(a)(1) as the jurisdictional predicate. Westinghouse moved to dismiss the appeal for lack of jurisdiction. That motion has been referred to this panel and is now before us.

II.

Ms. Gardner places primary reliance on the dictum in *Hackett v. General Host Corp.*, 455 F.2d 618, 622 (3d Cir.

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2. § *1292. Interlocutory decisions*

. . .

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

1972), which suggested that interlocutory review of a class denial might be had under § 1292(a)(1) "in those cases in which the refusal to grant class action designation amounts to a denial of a preliminary injunction broader than would be appropriate for individual relief." That suggestion was repeated in *Samuel v. University of Pittsburgh,* 506 F.2d 355, 358 n.6 (3d Cir. 1974), in *Rodgers v. United States Steel Corp.,* 508 F.2d 152, 160 (3d Cir. 1975), and again in a later aspect of the same case, *Rodgers v. United States Steel Corp.,* 541 F.2d 365, 372-73 (3d Cir. 1976). In none of these cases was the suggestion found to be applicable. In *Hackett* itself, interlocutory review of a class determination was refused. Thus, though it has not been expressly rejected in this circuit, neither has the *Hackett* suggestion ever been applied. This case directly presents the issue whether such an interpretation of § 1292(a)(1) can be squared either with the strong and consistent policy in this circuit of discouraging piecemeal appellate review, or with the special and narrow purposes of § 1292(a)(1).

A.

Following Judge Gibbons' seminal opinion in *Hackett,* this court, *in banc,* and again speaking through Judge Gibbons, enunciated what has become the core principle of class determination appealability in this circuit. "A class action determination, affirmative or negative, is not in this circuit a final order appealable under 28 U.S.C. § 1291. . . . [I]f there is any route open for the interlocutory review of a grant of class action treatment under rule 23(b)(3) in this circuit, it is only pursuant to 28 U.S.C. § 1292(b)." *Katz v. Carte Blanche Corp.,* 496 F.2d 747, 752 (3d Cir. 1974). *Katz* adjudicated the particular issue of a class certification granted under F.R. Civ. P. 23(b)(3). In other applications, however, the *Katz* principle has not been so limited. The requirement of a § 1292(b) certificate as a prerequisite to considering the case for interlocutory review has been applied neutrally to denials as well as

grants of class status and it has been applied to classes sought under rule 23(b)(2) as well as rule 23(b)(3).[3]

Our policy on this question derives, in part, from a balancing of "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v. Petroleum Conversion Corp.,* 338 U.S. 507, 511 (1950). We do not deny the importance of the class determination in many cases. Indeed, we have recently recognized that "class action determination has significant, practical effects on the litigation and an aggrieved party may have a very real interest in securing early appellate review." *Link v. Mercedes-Benz,* — F.2d — , — (3d Cir. 1976) (*in banc*) (plurality opinion). But the possible effects of a ruling are not determinative of whether it can be immediately appealed. Evidentiary rulings, for example, can be critically important but they are not the proper subject of an interlocutory appeal. The question is whether the *delay* in review will work an injustice. In the case of an application for an injunction, especially a preliminary injunction, the urgency of the matter is obvious. The request for an injunction goes to the merits of the case and delayed review may be the practical equivalent of no review. But a class determination does not partake of the same urgency. A decision on class status is wholly procedural. It is normally within the discretion of the trial court, *see Link v. Mercedes-Benz, supra,* — F.2d at — ; it may be conditional, subject to alteration or amendment prior to final judgment, F.R. Civ. P. 23(c)(1); and it does not implicate the merits of the case at all. If, after judgment on the merits, the relief granted is deemed unsatisfactory, the question of class status is fully reviewable. The delay involved is the same delay that accompanies review of all interlocutory procedural rulings in a case, and the delay in no way

3. *Link v. Mercedes-Benz,* — F.2d — (3d Cir. 1976); *Kramer v. Scientific Control Corp.,* 534 F.2d 1085 (3d Cir. 1976); *Ungar v. Dunkin' Donuts,* 531 F.2d 1211 (3d Cir. 1976); *Rodgers v. United States Steel Corp.,* 508 F.2d 152 (3d Cir. 1975); *Samuel v. University of Pittsburgh, supra; Hackett v. General Host Corp., supra.*

diminishes the power of the court upon review to afford full relief.

We perceive no irremediable consequences flowing from a postponement of review. At the same time, we do envision, in the rule here contended for, a sure and quick evisceration of our general policy against interlocutory review of class determinations. The adoption of the rule would not discourage attempts at interlocutory review, it would encourage them. Obviously, a prayer for an injunction can easily be added in most, if not all, purported class actions. Moreover, if we accepted the proposition that a refusal of class status could amount to a denial of an injunction, there is no reason why it could not also be argued that a grant of class status could amount to a grant of an injunction under § 1292(a)(1). *See Illinois Migrant Council v. Pilliod,* 540 F.2d 1062, 1072 (7th Cir. 1976). That, at least, would be a neutral application of the concept. It is true that, under the precise dictum of *Hackett,* not every refusal of a class is appealable. The refusal must "amount to" a denial of an injunction. But we would face in each case the question whether the particular refusal did or did not amount to the denial of an injunction. We would be faced with piecemeal review of that issue and the general rule of § 1291 and *Katz* would be effectively swallowed up by the § 1292(a)(1) exception.

B.

The purposes of § 1292 are narrow. The statute recognizes the necessity "to permit litigants to effectively challenge interlocutory orders of serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176, 181 (1955). The statute, however, does not leave the courts free to decide which interlocutory orders are appealable. It sets forth the exceptional orders specifically.[4]

4. In addition to the exception for orders relating to injunctions, § 1292 sets forth four other specific and precise exceptions to the final judgment rule:

The exception for orders relating to injunctions, understandably, has been the subject of litigation before. In *Morgenstern Chemical Co. v. Schering Corp.,* 181 F.2d 160, 162 (3d Cir. 1950), it was argued that a denial of summary judgment amounted to a denial of an injunction where the complaint sought injunctive relief. Speaking through Judge Hastie, this court rejected the argument:

> [T]he order below lacks the potential of drastic and far reaching effect on the rights of the parties which is characteristic of orders which decide the propriety of granting or refusing injunctions. Such potential supplies the rational basis for the incursion upon the general policy proscribing interlocutory appeals in the exceptional situations covered by § 1292. This view has recently been expressed by the Supreme Court in its statement that § 1292 indicates "the purpose to allow appeals from orders other than final judgments

4. (Cont'd.)

§ 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

when they have a final and irreparable effect on the rights of the parties." Cohen v. Beneficial Indus. Loan Corp., 1949, 337 U.S. 541, 545, 69 S. Ct. 1221, 1225. Similarly, in this circuit we have said, "The manifest purpose of the statute is to enable a litigant to seek prompt review in an appellate court from an order or decree which in most instances is effective upon its rendition and is drastic and far reaching in effect." Maxwell v. Enterprise Wall Paper Co., 3 Cir., 1942, 131 F.2d 400, 402. Thus, to construe § 1292 as applicable to the present order would unnecessarily divorce the meaning of the language used from its apparent purpose.

The Supreme Court rejected an identical argument concerning the effect of a denial of summary judgment in *Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966). A denial of a motion for summary judgment, said the Court, "is strictly a pretrial order that decides only one thing—that the case should go to trial." More generally, the Court emphasized that "[o]rders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view 'interlocutory' within the meaning of § 1292(a)(1)." *Id.* at 25.

We understand the conceptual basis of the theory advanced by Ms. Gardner. She argues that the ultimate injunctive relief in a successful action may be narrower if class status is denied than if class status were granted. But this effect will occur, if at all, only after a decision on the merits of the prayer for injunctive relief. Prior to that time, an order denying a class certification does not "touch on the merits of the claim" nor does it have "final and irreparable effect on the rights of the parties." In sum, a class determination, affirmative or negative, lacks the immediate and drastic consequences which attend an injunction and which form the basis for excepting injunctive rulings from the final judgment rule.

We recognize the division of the circuits on this issue. The First, Fourth, Fifth, and Ninth Circuits [5] have accepted the proposition that a class determination, at least in some instances, may be appealed under § 1292(a)(1). The Second and District of Columbia Circuits [6] have rejected that proposition. Today we align ourselves with the latter courts in holding that a class action determination may not be appealed under § 1292(a)(1). The only mode of interlocutory review in this circuit will continue to be pursuant to § 1292(b).

The motion to dismiss the appeal will be granted.

SEITZ, *Chief Judge*, Concurring.

The argument that the denial of class certification amounts to an injunction is that some injunctive relief which might be appropriate in a class action would not be appropriate in an individual suit by the named plaintiff. Thus, it is argued, the decision to refuse certification effectively limits the scope of injunctive relief which might be granted. *See Hackett v. General Host Corp.*, 455 F.2d 618 (3d Cir. 1972). The majority's response to this argument is, at least in part, that the decision not to certify does not foreclose the grant of class-wide injunctive relief because this decision can always be reviewed after final judgment, and the application for class certification and class-wide relief renewed in the district court. Thus, they say "[t]he question is whether the *delay* in review will work an injustice . . . [i]f, after judgment on the merits, the relief granted is deemed unsatisfactory, the question of class

5. *Doctor v. Seaboard Coast Line R.R.*, 540 F.2d 699 (4th Cir. 1976); *Jones v. Diamond*, 519 F.2d 1090 (5th Cir. 1975); *Price v. Lucky Stores, Inc.*, 501 F.2d 1177 (9th Cir. 1974); *Yaffe v. Powers*, 454 F.2d 1362 (1st Cir. 1972); *Spangler v. United States*, 415 F.2d 1242 (9th Cir. 1969); *Brunson v. Board of Trustees*, 311 F.2d 107 (4th Cir. 1962); see *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062 (7th Cir. 1976).

6. *Williams v. Mumford*, 511 F.2d 363 (D.C. Cir. 1975); *City of New York v. International Pipe and Ceramics Corp.*, 410 F.2d 295 (2d Cir. 1969) (semble).

status is fully reviewable. The delay involved is the same delay that accompanies review of all interlocutory procedural rulings in a case, and the delay in no way diminishes the power of the court upon review to afford full relief."

Thus, the majority's analysis depends on its position that the refusal to certify is always reviewable after final judgment. While I believe that this position is correct, it deserves greater explication than the majority has given it.[1]

If the district court should deny Ms. Gardner the individual relief she has sought, she could, of course, raise the district court's failure to certify along with her other assignments of error on appeal after final judgment. But the problem would be different on the eventuality that the district court *grants* her the individual relief she has sought. This contingency poses a question of Article III justiciability, namely, whether Ms. Gardner would have standing to appeal the district court's refusal to certify even though she would no longer have personal relief in the balance. If Ms. Gardner would not have standing to appeal the district court's refusal to certify after she had obtained the individual relief she has requested, the court's refusal to certify *could* have the effect of reducing the ultimate scope of injunctive relief.

The Supreme Court's decisions in *Sosna v. Iowa*, 419 U.S. 393 (1975) and *Board of School Comm'rs v. Jacobs*,

1. Portions of the majority's opinion indicate that, apart from the argument that the certification decision is reviewable after final judgment, the refusal to certify cannot be deemed to constitute the denial of an injunction because this refusal does not directly deny injunctive relief. In view of my conclusion that the certification decision is appealable after final judgment, I need not reach this alternative possible ground of decision. But I note that any argument that an order must directly grant or refuse injunctive relief to be appealable under §1292(a)(1) is not readily reconcilable with *General Electric Co. v. Marvel Rare Metals Corp.*, 287 U.S. 430 (1932), where the Supreme Court sustained the appealability of an order which dismissed a counterclaim for improper venue.

I also note that Ms. Gardner's complaint on behalf of herself and the class does not request temporary injunctive relief. I need not decide whether the disposition of this case should be different if she had. *See Stewart-Warner Corp. v. Westinghouse Electric Corp.*, 325 F.2d 822, 829-30 (Friendly, J., dissenting) (2d Cir. 1963).

420 U.S. 128 (1975) provide some guidance as to whether Ms. Gardner would have standing. *Sosna* involved the constitutionality of Iowa's requirement that a petitioner in a divorce action be a resident of the state for one year prior to the filing of the petition. After the district court had certified the suit as a class action but before the case reached the Supreme Court, the named plaintiff had satisfied the one year residence requirement. The Supreme Court nevertheless held that the suit was justiciable under Article III. "When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant." 419 U.S. at 399. On the other hand, in *Jacobs* the Supreme Court held the case moot when the named plaintiffs had lost their personal interest in the outcome after the district court purported to certify the suit as a class action. The Court stressed that the district court had not properly certified or even identified the class, and had not adequately determined that the criteria of Rule 23 were satisfied.

The general rule which would appear to emerge from *Sosna* and *Jacobs* is that a named plaintiff must have a live personal stake in the suit at the time the class is properly certified. Thereafter, the suit may be entertained without violating Article III even though no named plaintiff has a live personal stake, as long as the class has a continuing interest. The application of this rule here would seem to indicate that the successful individual plaintiff could not appeal the refusal to grant class status after final judgment, since any decision by the district court, on remand from this court, to certify the class would postdate the time when the named plaintiff lost her personal stake—at the time of the original judgment in her favor. But in footnote 11 of its opinion in *Sosna*, the Supreme Court indicated that the apparent general rule is not ironclad:

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes

> moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to "relate back" to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

Footnote 11 of *Sosna* was relied on in *Gerstein v. Pugh,* 420 U.S. 103, 110 at n.11. In *Pugh,* named plaintiffs had been incarcerated without a judicial determination of probable cause. The Supreme Court said that:

> At the time the complaint was filed, the named respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them were still in custody awaiting trial when the District Court certified the class. Such a showing ordinarily would be required to avoid mootness under *Sosna. See Sosna,* supra, at 402 n.11; (citation omitted). The length of pre-trial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is clear. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.

1. *Relation Back Under Footnote 11 of* Sosna.

While footnote 11 does not purport to give an exhaustive description of the circumstances in which certification may be deemed to relate back to the filing of the

complaint, it does not expressly allow relation back in circumstances other than those in which a controversy has such an inherently short cycle that a district court could not be expected to rule on a motion for certification before the named plaintiff's personal stake has expired. But the Court's language has not always been narrowly read.[2] In *Allen v. Likins,* 517 F.2d 532 (8th Cir. 1975), the court indicated that relation back is permissible when the district court has unduly delayed its decision on certification. In *Frost v. Weinberger,* 515 F.2d 57 (2d Cir. 1975), *cert. denied,* 424 U.S. 958 (1976), Judge Friendly said that the "apparent force" of the general rule stated in *Sosna* was "largely drained" by footnote 11. In *Frost,* the widow and two children of a deceased who had been insured under the Social Security Act claimed that the Social Security Administration had deprived them of benefits they deserved without a full evidentiary hearing. After they filed their complaint on behalf of "all persons who now or may in the future be entitled to survivors' benefits under the Act whose benefits have been or may be reduced without a prior hearing," the district court ordered the Secretary of Health Education and Welfare to conduct a full hearing on their claims within a month, and the Secretary did so. Subsequently, the court certified the class. The defendants claimed that the case should be dismissed as moot, because the named plaintiffs had already been given the hearing which they claimed was required by due process when the district court certified the class. In rejecting this argument, Judge Friendly said:

> The reason for generally requiring that the controversy be "live" as to the named plaintiff at the time of the class action designation is that otherwise the court would have no assurance that the named plaintiff will vigorously represent the class. This has little application when, as here, the court has deferred class action determination, with the agreement of all parties,

2. *But cf. Napier v. Gertrude,* 542 F.2d 825 (10th Cir. 1976).

pending a ruling on the merits. The Government has pointed to no respect in which this case would have proceeded differently if the court had certified this as a class action on November 16, 1973, rather than in its decision of May 3, 1974. If as Mr. Justice White said with some justification in his dissent in *Sosna,* 419 U.S. at 412 (footnote omitted), "The only specific, identifiable individual with an evident continuing interest in presenting an attack upon the residency requirement is appellant's counsel" and, if the Court had overcome this by a "legal fiction" consisting of "the reification of an abstract entity, 'the class', constituted of faceless, unnamed individuals who are deemed to have a live case or controversy against appellees," it scarcely can be consequential in a case like this whether the named plaintiff had obtained a hearing in the period which, with the agreement of the parties, the court took to make its class action determination. 515 F.2d at 64.

To the extent that the Supreme Court's opinion in *Sosna* relies upon legal fictions, I agree with Judge Friendly that it cannot be deemed to identify the real considerations which must guide any determination of whether a case is justiciable under Article III. While the Court's determination that class certification brings new interests before the court does not appear to involve a legal fiction, the device of relation back clearly does, and thus it is important to identify the real considerations which motivate the use of this device.

The Supreme Court's apparent concern is that if the named plaintiff's stake expired before the class was certified and thus "acquired a legal status separate from the interest asserted by [named plaintiff]," there would be a hiatus in which there would be no live interests before the court. Use of the relation back device may alleviate this concern by recasting the facts so that the interests of the class are deemed to have been presented to the court at a time when the named plaintiff had a live stake.

But the concern that there might be an interval in which no live interests are before the court is not, in my opinion, a compelling one. In the first place, the fact of the matter is that in any case—such as *Pugh*—in which the device of relation back is used there will have been such an interval. It is true that footnote 11 of *Sosna* does not explicitly allow extension of the relation back device to cases other than those where the controversy tends to dissipate before class certification can be expected, and that the footnote states that the applicability of relation back "may depend . . . especially [upon] the reality of the claim that otherwise the issue would evade review." But it would appear that to the extent the "capable of repetition, yet evading review" criterion would be relevant to justiciability, it would bear on the "discretionary decision whether to reach the merits of an issue, rather than [the] Art. III 'case or controversy' requirement." *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 781 (Powell, J., concurring in part and dissenting in part).

In some circumstances, the "capable of repetition, yet evading review" criterion *is* relevant to whether Article III has been satisfied. In *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975), the Court said:

> *Sosna* decided that in the absence of a class action, the "capable of repetition, yet evading review" doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. The instant case, not a class action, clearly does not satisfy the latter element.

In the context of *Bradford,* the fact that the same complaining party might reasonably be expected to be subjected to the same action again is undoubtedly relevant to

whether Article III is satisfied. If an individual plaintiff can show that there is "a reasonable expectation that [he will] be subjected to the same action again," he can show that he continues to have a personal interest in the outcome of the case, despite apparent mootness. On the other hand, if he cannot show that the question is "capable of repetition" as to himself, he will fail to show that he continues to have a personal interest in the outcome of the case. Thus, my reading of *Bradford* indicates that the doctrine of "capable of repetition, yet evading review," when it bears upon Article III, is a way of demonstrating that the constitutional requirement of "case or controversy" is really met, despite apparent mootness. The doctrine does not function to provide an *exception* to the constitutional requirement. In fact, it would seem improper to make an exception to the requirements set forth in the broad language of Article III.[3]

On the other hand, there are circumstances in which the doctrine of "capable of repetition, yet evading review" goes to the "discretionary decision to reach the merits of an issue, rather than [the] Art. III 'case or controversy' requirement." In *Sosna*, the Supreme Court mentioned that one factor weighing in favor of justiciability was that Iowa's one year residence requirement for filing a divorce was so short that it tended to evade review. But in *Franks v. Bowman Transp. Co., supra*, the Court said: "nothing in our *Sosna* or [*Jacobs*] opinions holds or even intimates that the fact that the named plaintiff no longer has a personal stake in the outcome of a certified class action renders the class action moot unless there remains an issue 'capable of repetition, yet evading review.' " (citation omitted) 424 U.S. at 754. Rather, the Court felt that the "capable of repetition, yet evading review" criterion went to the discretionary component of justiciability, and that Article III was satisfied solely because the interests of the class were before the court.

3. In *United States v. Richardson*, 418 U.S. 166, 179-80 (1974), the Court indicated that standing is not conferred by virtue of the fact that "if respondent is not permitted to litigate this issue, no one can do so."

With respect to relation back, it would seem that the doctrine of "capable of repetition, yet evading review" would only be relevant to any constitutional requirement that there *always* be live interests before the court if the doctrine is a way of demonstrating that such a constitutional requirement is in fact satisfied even where it might not appear to be. If the doctrine does not serve as a way of showing that there continue to be live interests before the court, then it goes to the discretionary component of justiciability, and the fact that the Supreme Court mentioned the doctrine in footnote 11 of *Sosna* does not imply that there is any constitutional requirement that there be live interests before the court at every moment of a lawsuit.

The fact that a case presents an issue which may well become moot as to the named plaintiff before class certification can be expected does not imply that during the interval between mootness with respect to the named plaintiff and class certification there continue to be live interests before the court.[4] Thus, the fact that footnote 11 of *Sosna* mentions the question of whether a controversy tends to dissipate before class certification does not imply that there is a constitutional requirement that there be live interests before the court at every moment of a lawsuit. In fact, since footnote 11 allows relation back and since the evading review consideration does not speak to Article III, it would seem that footnote 11 implies that there is *no* constitutional requirement that there be live interests before the court at every moment of a lawsuit.

I find any argument that there should be such a requirement unconvincing. There is no reason why holding a case in abeyance until live interests come before the court should mean that the case will not go forward with the necessary concreteness and adverseness. *See Flast v. Cohen*, 392 U.S. 83, 99 (1968). I would view any conten-

4. In *Gerstein v. Pugh*, 420 U.S. at 110-11 n.11, the Court appeared to look to whether the issue was capable of repetition as to the class members, not as to the named plaintiffs.

tion that a court must at all times have a live plaintiff before it and cannot consider adding new interests to repair any deficiency as barren of reality. This is not to say that the class may be certified at any time, but merely that Article III does not divest courts of all discretion to consider adding new parties—even after final judgment—after it appears that former parties have lost their personal stake.[5]

Moreover, as to the discretionary component of justiciability, I believe that this court should entertain an appeal from the district court's refusal to certify the class by a named plaintiff who has received all the individual relief she has requested, at least when the named plaintiff made a timely motion for class certification in the original proceedings. The contrary position would insulate from appellate review a decision of far reaching consequences,[6] and might frustrate the interests of judicial economy since it would encourage a multiplicity of lawsuits in conditions where a class action would be the preferable mode of adjudication.

In sum, I conclude that footnote 11 in *Sosna* should be given an expansive reading, so that Ms. Gardner, even if she obtains all the individual relief she has requested, would have standing to seek reversal of the district court's decision not to certify.

2. *The Named Plaintiff's Continuing Interest.*

The relation back device found in footnote 11 of *Sosna* rests on the theory that upon certification, the interests of the *class* are before the court. But even apart from my conclusion that footnote 11 poses no barrier to, and impliedly permits certification after the named plaintiff's claim is already moot, I believe that the successful named plaintiff could complain of the district court's failure to certify the class because he has the continued *personal* interest of exercising his fiduciary responsibilities with respect to the members of the class he has sought to represent.

5. I agree with *Napier v. Gertrude, supra* n.2, that the fact that the Supreme Court in *Jacobs* did not remand for proper application of F.R. Civ. P. 23 does not weigh against my position, since "[t]he Court did not rule . . . that mootness removed its power to remand, and it does not appear that the failure to certify the class action was assigned as error . . ." 542 F.2d 825, 827.

6. Even if we should hold that the district court's refusal to certify in *this* case may be brought up on an interlocutory appeal because it cannot be reviewed after final judgment, there would still be cases which could not be appealed under §1292(a)(1) because the complaint does not seek injunctive relief. *See Hackett v. General Host Corp.*, 455 F.2d 618 (3d Cir. 1972).

The Supreme Court has apparently never expressed, or been asked to express, any view on the theory that the putative named plaintiff of a class action has a personal interest which stems from the fact that he is a fiduciary with respect to the members of the class. But there are several indicia of the fact that filing an action with a request for class treatment imposes a fiduciary responsibility upon the putative named plaintiff: 1) even before class certification, the action may not be settled or dismissed without court approval,[7] *Kahan v. Rosenstiel*, 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970), 2) F.R. Civ. P. 23(a)(4) requires as a prerequisite for certification that "the representative parties will fairly and adequately protect the interests of the class", 3) F.R. Civ. P. 23(d)(2) gives the court power to issue orders "requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action," *see Knuth v. Erie-Crawford Dairy Coop. Assoc.*, 395 F.2d 420 (3d Cir. 1968). The fiduciary responsibility of representative parties also,

7. In determining that Article III does not always require that a named plaintiff's personal stake continue throughout the litigation, *Sosna*, 419 U.S. 393, 399 at n.8 mentioned that "Once the suit is certified as a class action, it may not be settled or dismissed without the approval of the court."

in my view, explains why class representatives may ever raise matters bearing on the interests of class members even though they have no tangible personal interest in these matters—including the very question of class certification.

I conclude that whether on the relation back theory found in footnote 11 of *Sosna,* or on the theory that Ms. Gardner has a continuing personal stake stemming from the fact that she is a fiduciary on behalf of the putative class, she would be able to appeal the district court's refusal to certify after final judgment even though she receives all the individual relief which she has requested. Since the district court's refusal to certify will always be appealable after final judgment, it can hardly be said that the court's decision has foreclosed the possibility that the class could ultimately be certified and class-wide relief granted. Thus, the court's refusal does not amount to an injunction for purposes of § 1292(a)(1), and the present interlocutory appeal must be dismissed.

APPENDIX B

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 76-1410

JO-ANN EVANS GARDNER

v.

WESTINGHOUSE BROADCASTING COMPANY,

Jo Ann Evans Gardner, on her own behalf as a representative of the class and on behalf of the class that she seeks to represent,

Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and ALDISERT, ADAMS, GIBBONS, HUNTER and GARTH, Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Aldisert
Judge

Dated: July 22, 1977

*Judges Rosenn and Weis did not participate in the consideration of this matter.

UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 76-1410

JO-ANN EVANS GARDNER

v.

WESTINGHOUSE BROADCASTING COMPANY,

Jo Ann Evans Gardner, on her own behalf as a representative of the class and on behalf of the class that she seeks to represent,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

OPINION SUR DENIAL OF PETITION FOR REHEARING

(Filed July 22, 1977)

GIBBONS, Circuit Judge, dissenting

I dissent from the denial of appellant's petition for rehearing in banc. That petition presents an issue which meets every criterion for in banc reconsideration far more than most cases that this court has recently so considered.

See Fed. R. App. P. 35(a); Walton v. Eaton Corp., Civ. No. 76-1707 (3d Cir. filed July 18, 1977) (Gibbons, J., dissenting). Moreover, the panel opinion, in a case in which it was not even necessary to reach the question, has announced a broad prohibition against reviewability of pendente lite denials of class action injunctive relief in civil rights cases. Such a prohibition is inconsistent with the prior law of this circuit, inconsistent with the better reasoned decisions in other circuits,[1] and unsound except as an indication of hostility to the underlying rights being asserted. In that unarticulated hostility, of course, lies the explanation for the decision.

As Judge Aldisert's opinion for the panel majority acknowledges, the seminal opinion in this circuit on the reviewability of class action determinations is Hackett v. General Host Corp., 455 F. 2d 618 (3d Cir. 1972), cert. denied, 407 U.S. 925 (1972), in which we declined to adopt the so-called "death knell" rule of the Second Circuit, that an order denying a motion to permit a case to proceed as a class action may be reviewable as a collaterally final order within the meaning of 28 U.S.C. § 1291 and Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). But while Hackett declined to treat a negative class action determination as a final order it carefully preserved the

1. See Note 2 infra.

right to seek appellate review under 28 U.S.C. § 1292(a)(1) where the denial of class certification amounts to the denial of preliminary injunctive relief. In Hackett, we specifically referred to

> ". . . those cases in which the refusal to grant class action designation amounts to a denial of a preliminary injuction broader than would be appropriate for individual relief. 28 U.S.C. § 1292(a)(1). See, e.g., Oatis v. Crown Zellerback Corp., 398 F.2d 496 (5th Cir. 1968); Shapiro, Bernstein & Co. v. Continental Record Co., 386 F.2d 426 (2d Cir. 1967); Brunson v. Board of Trustees, 311 F.2d 107 (4th Cir. 1962). This category of interlocutory appeals is adequate, we think, to protect against most district court inhospitability to class action litigation involving civil rights, the elective franchise, protection of the environment and the like."

455 F.2d at 622. The point made in Hackett, a point that, in my view at least, was the essential justification for rejecting the Second Circuit's "death knell" rule as announced in Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967), was that in civil rights litigation, injunctive relief in favor of a single plaintiff usually would do nothing whatsoever for the remaining members of the class. A single black child

might be placed in a white school, while all of the child's fellow black classmates were left in a segregated school. In such a case the denial of class action treatment would have the practical effect of denying injuctive relief to the entire class. Moreover, the key issue in such a case, and the key issue in the position taken by the panel majority, is availability of pendente lite injuctive relief. Hackett concluded that we did not need the Eisen interpretation of § 1291 because a denial of pendente lite relief benefiting a class, in the guise of a denial of class action treatement, was reviewable under § 1292(a)(1). Now, without taking the case in banc, a panel majority has overruled the very fundamental premise on which our Hackett holding rests. It has done so, moreover, despite the fact that we reiterated that premise in Rodgers v. United States Steel Corp., 541 F.2d 365, 372-73 (3d Cir. 1976); Rodgers v. United States Steel Corp., 508 F.2d 152, 160 (3d Cir. 1975) and Samuels v. University of Pittsburgh, 506 F.2d 355, 358 n.6 (3d Cir. 1974).

In Hackett we also noted the availability of appellate review, in cases where the denial of class action relief might not amount to the denial of injunctive relief benefiting a class, either under 28 U.S.C. § 1292(b) or under Fed. R. Civ. P. 54(b). A plurality of this court in banc has demonstrated a determination to make the § 1292(b) route a practical impossibility. See Link v.

Mercedes-Benz of North America, Inc., 550 F.2d 860 (3d Cir. 1977) (Gibbons, J., dissenting). The court has also erected a major, useless, and frequently disregarded impediment to the utilization of Rule 54(b). See Allis Chalmers Corp. v. Philadelphia Electric Co., 521 F.2d 360 (3d Cir. 1975). Thus, each of the alternative safeguards upon which we premised the Hackett holding has now been eliminated or substantially eroded.

The panel majority opinion need not have reached out to overrule completely the fundamental premise of the Hackett holding in this case. It could have noted, as Judge Seitz' concurrence does at note 1, that the complaint in this case did not request pendente lite relief in favor of the proposed class. Thus the majority could have restricted its language so as to apply its rejection of § 1292(a)(1) appealability to that situation only, leaving open the possibility of an appeal when the putative class representative did seek pendente lite relief. Instead, in sweeping language, it totally rejects a substantial and well considered body of authorities which recognize the appealability of denials of class certification under § 1292(a)(1) where the denial amounts to a rejection of pendente lite injunctive relief.[2]

2. Doctor v. Seaboard Coast Line R.R., 540 F.2d 699 (4th Cir. 1976); Jones v. Diamond, 519 F.2d 1090 (5th
(footnote 2. continued on next page)

2. (continued)
Cir. 1975); Price v. Lucky Stores, Inc., 501 F.2d 1177 (9th Cir. 1974); Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972); Spangler v. United States, 415 F.2d 1242 (9th Cir. 1969); Brunson v. Board of Trustees, 311 F.2d 107 (4th Cir. 1962); see Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976).

The only explanation we are given in defense of this broad judicial pronoucement is the brief sentence: "We perceive no irremediable consequences flowing from a postponement of review." Majority Op. at ___. That is indeed a faulty perception. If class action pendente lite relief is denied in a voting rights case elections will pass before the case reaches us on final hearing, and class members will have been disenfranchised at those elections. If class action pendente lite relief is denied in a school desegregation case class members will remain for years in segregated classrooms, suffering the permanent psychological effects of inadequate educational opportunities. If class action pendente lite relief is denied in an employment discrimination case years will go by during which class members remain locked in dead end jobs lacking challenge, stimulation, and opportunity for intellectual growth. To suggest that these would not be irremediable consequences it to make a mockery of equitable principles respecting pendente lite relief, and to defy the intention of Congress when it provided in the Evarts Act, Act of March 3, 1891, 26 Stat. 826, for appellate review of grants or denials of injunctive relief.

I find most disturbing the signals which have gone out from this court to the district courts of this circuit with respect to class action determinations. We seem to be saying that we have totally abdicated all responsibility

for making Rule 23 serve its intended remedial purposes. This last signal is the most disturbing of all, because it removes completely from appellate review pendente lite review of denials of class action injunctive relief in civil rights cases. In most economic class action cases, e.g., cases under § 10(b) of the Securities Act of 1934,[3] a preliminary injunction in favor of the individual plaintiff will, for all practical purposes, fully protect the entire class. A preliminary injunction against a deceptive practice or a false proxy statement will terminate the ongoing effect of either. In such case a denial of pendente lite injuctive relief in the individual's case will be appealable, and that appeal will inure to the benefit of the economic class whether or not the district court granted class action treatment. Thus, instances in which an economic class will be subjected pendente lite to a continuing course of illegal conduct will be comparatively rare.

In the civil rights area of the law, however, an individual voter may be registered and allowed to vote pendente lite, an individual child plaintiff may be transferred and enrolled pendente lite in a desegregated school, an individual female may be promoted pendente lite, while

3. 15 U.S.C. §78j(b); See Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 (1974).

the discrimination against the class of which each was a member continues. If the district judge is favorably disposed to the underlying civil rights claim, grants class action treatment, and affords injunctive relief benefiting the class, the defendant will be able to appeal under § 1292(a)(1). If, however, that district judge is unfavorably disposed, the panel majority opinions has indicated to him precisely how to shield from an appellate review his unwillingness to grant pendente lite relief to the class.

All of our opinion dismantling opportunities for review of district court actions in class action cases refer, in one way or another, to the diluvium consequences upon our caseload of any other than door closing rules. In Link v. Mercedes Benz, supra, I observed that an actual count of § 1292 (b) applications belied any need for such a concern. 550 F.2d at 873-74. I am equally convinced that dismantling of the protection afforded to potential class members by the availability of pendente lite appellate review pursuant to § 1292(a)(1) will have about as significant an effect on our appellate caseload as taking a bucket of water out of the Delaware River today will have on tomorrow's tide at Cape May. The real issue is this court's hospitality or inhospitality to class actions, particularly those asserted on behalf of minorities. The vibrations I feel are decidedly hostile.

This case warrants the court's in banc attention. If

the Supreme Court is at all interested in the availability of pendente lite injunctive relief in civil rights class actions, it warrants that Court's attention as well.

Judge Adams, too, believes that this case warrants the Court's in banc attention.

APPENDIX C

Opinion of the District Court

UNITED STATES DISTRICT COURT,
W. D. PENNSYLVANIA.

JO ANN EVANS GARDNER

v.

WESTINGHOUSE BROADCASTING COMPANY

Civil Action No. 75-614

February 3, 1976.

ROBERT N. HACKETT, ESQ.
Pittsburgh, Pa.,
for plaintiff.
WENDELL G. FREELAND, ESQ.
Pittsburgh, Pa.
for defendant.

MEMORANDUM AND ORDER

McCUNE, District Judge

The subject of this suit is alleged sex discrimination. We consider a motion for class action determination filed pursuant to Local Rule 34(c) on July 9, 1975. By stipulation of counsel argument on the motion was postponed (in order to allow some time for discovery) until October 30, 1975. On October 30, 1975, the issue was

argued and briefs have been considered. The class action is brought under Rule 23(b)(1) and (2). The action concerns defendant's radio station, KDKA.

On the same day an additional motion was filed to require defendant to answer interrogatories concerning the make up of the employee rosters of six additional radio stations owned and operated by defendant which are located in other cities. The issue on the second motion is whether this suit will be confined to KDKA Broadcasting in Pittsburgh, Pa., or expanded on a nationwide basis to include all of the defendant's radio stations located in six other cities. There will be no need to consider the second motion unless we certify the action as a class action.

The plaintiff is Dr. Jo Ann Evans Gardner who unsuccessfully sought employment as a radio talk show hostess on the defendant's radio station, KDKA. It is alleged that she read in the radio-television column of a Pittsburgh newspaper that the radio station was looking for a male to fill the position of talk-show host and a female to be a consumer reporter. She applied for the position as talk-show host but was not hired for that position. She alleges that the job was given to a male and that she was the subject of discrimination.

In answers to interrogatories, plaintiff describes

hereself thus: "I am articulate, well educated, quick witted, well spoken and experienced in public speaking. I am knowledgeable in the field of psychology and interact well with people. I enjoy conversation. I have a clear, pleasant voice which is lively, interesting and transmits well by radio communication. Compared with the men who are talk-show hosts, I would offer a new and different personality attractive to another wide audience and this would help Westinghouse Broadcasting capture more listeners, increase its ratings and hence its revenues."

She seeks to represent all women who are employed, have been employed, have unsuccessfully sought to be employed and might be employed by defendant as professionals, officials and managers in its broadcasting staff, or as technicians, salesworkers or otherwise.

The defendant argues that this action should not be certified as a class action because plaintiff had applied for a very special job which demands specific talent and expertise and thus there are no questions of law or fact common to the class of women whom she seeks to represent as required by Rule 23(a)(2) and further, that the claims or defenses of the parties are not typical of the claims or defenses of the class as required by Rule 23(a)(3).

The defendant further argues that under Rule

23(b)(1)(A) and (B), there is no risk of inconsistent or varying adjudications with respect to individual members of the class because there was only one opening for a talk-show host which required a person with unique artistic ability and an adjudication with respect to the plaintiff would not impair or impede the ability of others to protect their interests. Defendant argues that under 23(b)(2) the defendant has not acted on grounds generally applicable to the class. Further, defendant argues that the questions of law and fact affect the plaintiff alone, due to her unique claim, and that she has nothing in common with the ordinary day-to-day applicant for a job at KDKA. Therefore, a class action is not superior to other available methods for the fair adjudication of the controversy.

In summary, the claim of defendant is that one seeking a single, unique job has nothing in common with other members of a class of women who have not been hired or promoted or who have been discharged.

I suppose the facts which will eventually be considered will be somewhat unique as regards the plaintiff. Whether she was qualified as atalk-show host will be more difficult to determine than whether a bookkeeper or a secretary or a salesperson is qualified.

According to answers to interrogatories, KDKA

Broadcasting has eleven departments, a few of which employ people requiring some talent, e.g., the Editorial Writer's Department and the News Department, including news announcers and the Talent Department, including departments where peculiar talent may or may not be required such as the Business and General Services Department and the Personnel and Administrative Coordinator's Department. In all Departments there are only 78 employees, of whom 21 are females holding jobs of every description. From January 1, 1972, to the time of the filing of the answers, 28 females were hired by the radio station. From January 1, 1972, to the time of filing answers to interrogatories, 6 females were discharged, two of whom were telephone operators and receptionists, one of whom was a secretary, one an accounting clerk, one a traffic correlator and one an account executive. The plaintiff makes reference to no other individual. She alleges broad based discrimination as the result of her personal experience at KDKA.

The first duty imposed upon the court under Wetzel v. Liberty Mutual Insurance Company, 508 F. 2d 239 (3rd Cir. 1975) is to determine if the four prerequisites for a class action, listed in Rule 23(a), have been met. At least two of the four prerequisites are missing here. Rule 23(a)(2) requires questions of law and fact common to the class and 23(a)(4) requires that the representative parties will fairly and adequately protect the interests of the

class.

Adequate representation depends on two factors: (a), the plaintiff's attorney must be qualified and we find that he is qualified and (b), the plaintiff must not have interests antagonistic to those of the purported class.

Dealing with the last statement first, it is our view that plaintiff may well have antagonistic interests to those women now employed by defendant. Plaintiff seeks the job as talk-show host. Is this objective antagonistic to the interests of the women now employed at KDKA who may seek promotion to the job? It is difficult to say but since there is only one job available there may be several women who consider themselves qualified and who would intend to compete with plaintiff. Thus the class, or part of it, may well be in conflict with plaintiff. At least this query points up the lack of commonality inherent in plaintiff's situation vis-a-vis the members of the proposed class. We conclude that there are no questions of law or fact common to the class of women whom plaintiff seeks to represent as required by Rule 23(a)(2) and plaintiff's claim is not typical of the claims of the members of the proposed class as required by Rule 23(a)(3). Accordingly, we refuse to certify this action as a class action.

UNITED STATES DISTRICT COURT,
W. D. PENNSYLVANIA.

JO ANN EVANS GARDNER

v.

WESTINGHOUSE BROADCASTING COMPANY,

Civil Action No. 75-614

ROBERT N. HACKETT, ESQ.
Pittsburgh, Pa.,
for plaintiff.
WENDELL G. FREELAND, ESQ.
Pittsburgh, Pa.,
for defendant.

Order

AND NOW, February 3, 1976, the motion of plaintiff for class action determination is denied. The motion to compel answers to interrogatories concerning six additional radio stations is denied.

BY THE COURT,

/s/ Barron P. McCune,
District Judge

APPENDIX D

Act of June 25, 1948, c.646, 62 Stat. 929; as amended, 28 U.S.C. § 1292:

§ 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in

which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-560

JO ANN EVANS GARDNER,
Petitioner
v.
WESTINGHOUSE BROADCASTING COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Petition for Certiorari Filed
October 14, 1977

Certiorari Granted December 5, 1977

INDEX TO RECORD

INDEX TO RECORD

RELEVANT DOCKET ENTRIES

May 20, 1975	Complaint filed; Summons issued
June 3, 1975	Summons returned; served on defendant May 22, 1975
June 11, 1975	Answer filed
July 9, 1975	Motion to Determine a Class Action filed by plaintiff
July 9, 1975	Interrogatories to Defendant Westinghouse Broadcasting Company in Order to Determine a Class Action filed by plaintiff
July 22, 1975	Notice of serving interrogatories upon plaintiff filed by defendant

Relevant Docket Entries

August 27, 1975	Answers to Interrogatories to Defendant Westinghouse Broadcasting Company in Order to Determine a Class Action filed by defendant
September 17, 1975	Answers to defendant's Interrogatories to Plaintiff filed by plaintiff
October 30, 1975	Motion to Compel Discovery filed by plaintiff, with proposed order thereto
October 30, 1975	Oral argument held before the Honorable Barron P. McCune, District Judge

Relevant Docket Entries

February 4, 1976	Memorandum and Order of the United States District Court for the Western District of Pennsylvania filed denying Motion to Determine a Class Action and Motion to Compel Discovery
February 25, 1976	Notice of Appeal filed by plaintiff; cash bond posted by plaintiff
August 26, 1976	Motion to Dismiss Appeal for Lack of Jurisdiction filed by appellee
September 20, 1976	Response to Appellee's Motion to Dismiss Appeal for Lack of Jurisdiction filed by appellant

Relevant Docket Entries

October 8, 1976	Order entered by United States Court of Appeals for the Third Circuit, denying appellee's Motion to Dismiss Appeal
February 28, 1977	Order entered by United States Court of Appeals for the Third Circuit revoking Order dated October 8, 1976 and referring appellee's Motion to Dismiss Appeal to the Merits panel
June 6, 1977	Opinion and Judgment entered by the United States Court of Appeals for the Third Circuit, granting appellee's Motion to Dismiss Appeal for Lack of Jurisdiction

Relevant Docket Entries

June 20, 1977	Petition for Rehearing filed by appellant
July 22, 1977	Order filed by the United States Court of Appeals for the Third Circuit denying appellant's Petition for Rehearing and Opinion Sur Denial of Petition for Rehearing filed

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JO-ANN EVANS GARDNER)
)
Plaintiff,)
) Civil Action
v.) No. 75-614
)
WESTINGHOUSE BROADCASTING)
COMPANY,) Complaint -
) Class Action
Defendant.)

COMPLAINT

COUNT I

Jurisdiction of this Court is invoked pursuant to 28 USC §1343(4); 42 USC §2000e-5(f), and 28 USC §2201 and §2202. This is a suit in equity authorized and instituted pursuant to Title VII of the Act of Congress known as "The Civil Rights Act of 1964", 42 USC §2000e et seq. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured

by 42 USC §2000(e) et seq. providing for injuctive and other relief against sex discrimination in employment.

II

This is a proceeding for a declaratory judgment as to Plaintiff's rights and for permanent injunction restraining Defendant from maintaining a continuing policy, practice, custom or usage of: (a) discrimination against Plaintiff and other female persons in this class because of sex with respect to hiring and job classifications, compensation terms, conditions and privileges of employment and, (b) limiting and classifying employees of Defendant in ways that deprive Plaintiff and other female persons in this class of equal status as employees because of their sex.

III

Plaintiff, JO-ANN EVANS GARDNER, Ph.D., is a female citizen of the United States and a resident of Pittsburgh in the Commonwealth of Pennsylvania, whose

address is 726 St. James Street, Pittsburgh, Pennsylvania 15232. Plaintiff Gardner unsuccessfully sought employment from Defendant as a radio talk-show host.

IV

Defendant, WESTINGHOUSE BROADCASTING COMPANY, is a corporation which operates radio stations licensed by the Federal Communications Commission, with its principal center of operations for Western Pennsylvania located at One Gateway Center, Pittsburgh, Pennsylvania 15222. The Defendant is an employer within the meaning of 42 USC §2000(e)(6) and (c) in that it is engaged in an industry affecting commerce and employes [sic] at least fifteen (15) persons.

V

CLASS ACTION ALLEGATIONS

A. Plaintiff brings this action on her own behalf and on behalf of other persons similarly situated pursuant to Rule 23(b)(1) and (2) of the Federal Rules of Civil Procedure. The class

which Plaintiff represents is defined as follows:

(1) female persons who are now employed, have been employed from July 2, 1965 to the present, or might be employed by the Defendant as professionals, officials and managers in its broadcasting staff or as technicians sales workers or otherwise;

(2) those females who have unsuccessfully applied for employment from the defendant;

(3) those females who have been discharged by Defendant;

(4) those females who would have applied for employment but for the reputation of Defendant in the community that Defendant denied equal opportunity to females; and

(5) those females who will apply and will not be considered for certain jobs because of their sex.

All of these persons have been and will continue to be or might be adversely affected by the practices complained of herein. There are common questions of law and fact affecting the rights of the

members of this class who are, and continue to be limited, classified and discriminated against in ways which deprive and tend to deprive them of equal employment opportunities and otherwise adversely affect their status as employees because of their sex. These persons are so numerous that joinder of all members is impracticable. A common relief is sought. The interests of said class are adequately represented by Plaintiff. Defendant has acted or refused to act on grounds generally applicable to the class.

B. The following practices, policies, customs and usages made unlawful by Title VII of the Civil Rights Act of 1964 have been instituted and/or maintained by the Defendant: (1) the Defendant has maintained a pattern and practice in hiring resulting in Plaintiff and other members of the same class having been denied consideration for jobs, refused opportunities for jobs, denied opportunities, for promotions for jobs, and not provided equal opportunities, (2) Plaintiff and the class she

represents are qualified for employment and promotions on the same basis as such opportunities are provided for male employees, but Plaintiff and the class are denied these opportunities, (3) the Defendant has maintained a posture of denying equal opportunity to women which is well-known in the community thus discouraging women from seeking employment. Defendant has further descriminated against females as set forth in Exhibit "A".

C. The size of the class equals all of the female members of the broadcasting staff, technicians and sales workers employed by Defendant since July 2, 1965, all females who might be employed in the broadcasting staff, technical staff or sales work force of an unknown number, all females not hired by Defendant of an unknown number, this is in certain jobs not considered because of their sex, all females discharged by Defendant of an unknown number, and all females who would have applied for employment but for Defendant's reputation in the community for denying equal

opportunity to females of an unknown number.

D. The Plaintiff adequately represents the class because:

(1) She is a female who has not been considered for a job or hired because of sex discrimination.

(2) All of the members of the class claim the same type of injury, i.e., sex discrimination.

(3) All aspects of the employment practices of the Defendant are permeated with sex discrimination and Plaintiff is suffering from one of those aspects.

VI

On April 19, 1972, within ninety (90) days of the occurrence of the continuing acts of which she complains, Plaintiff filed written charges (EEOC Case No. TPI2-0823) under oath, with the Equal Employment Opportunity Commission alleging denial by Defendant of Plaintiff's rights under Title VII of the Civil Rights Act of 1964, 42 USC §2000(e) et seq. On February 28, 1973, the Commission issued a determination that

there was reasonable cause to believe that the charge was true. The Commission further informed Plaintiff on April 7, 1975 that she was entitled to bring a civil action in the appropriate Federal District Court within ninety (90) days of receipt of said notice.

VII

Plaintiff and the class she represents have no plain, adequate, or complete remedy at law to redress the wrongs alleged herein and this suit for a permanent injunction is her only means of securing adequate relief. Plaintiff and the class she represents are now suffering and will continue to suffer irreparable injury from Defendant's policies, practices, customs and usages as set forth herein.

COUNT II

VIII

Plaintiff incorporates by reference Paragraphs II, III, IV, V and VII of this Complaint as if they were set forth at length herein.

IX

Defendant by its acts detailed herein is in violation of Article I §27 of the Pennsylvania Constitution which guarantees equal rights under the laws to all citizens of the Commonwealth without regard to sex.

WHEREFORE, Plaintiff respectfully prays this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited and upon such hearing to:

1. Grant Plaintiff and the class she represents a permanent injunction enjoining the Defendant, its agents, employees, attorneys and those acting in concert with them and at their discretion from continuing to abridge the rights of Plaintiff and the class she represents by discrimination.

2. Grant Plaintiff and the class she represents relief requiring Defendant to make whole, by appropriate back pay and otherwise, all such individuals who have been adversely affected by the

practices and the policies complained of.

3. Grant Plaintiff and the class she represents reasonable attorney's fees pursuant to Section 706(k) of Title VII.

BASKIN, BOREMAN, WILNER
SACHS, GONDELMAN & CRAIG

By: s/Robert N. Hackett
Robert N. Hackett
Attorney for Plaintiff

CHARGE OF DISCRIMINATION

(If you have a complaint, fill in this for[m] and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to b[e] used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. _____

(PLEASE PRINT OR TYPE)

1 Your Name (Mr., Mrs., Miss) (Indicate) Dr. Jo-Ann Gardner Phone Number _____

Street Address 726 St. James Street

City Pittsburgh State PA Zip Code 15232

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☐ Religious Creed ☐ National Origin ☐ Sex ☒ (Female)

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name KDKA Radio

Street address One Gateway Center

City Pittsburgh State PA Zip Code 15222

AND (other parties if any) _____

4 Have you filed this charge with a state or local government agency? Yes ☒ When 1 (MONTH) 17 (DAY) 72 (YEAR) No ☐

5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

6 The most recent date on which this discrimination took place: Month Continuing Day _____ Year _____

16a Complaint (Exhibit A)

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

I asked for and was given an interview after responding to a column appearing in one of Pittsburgh's local newspapers. Accordingly, it mentioned that the above radio station was looking for a man for an evening radio talk show job and a woman for the job of Consumer and Fashion Reporter. During that interview, I made it clear that I was not interested in the Consumer & Fashion Reporter job & I additionally requested that I be informed as to the identity of the person who was filling the position that I applied for. Subsequently, I was notified Consumer, Fashion, etc., Reporter's position had not been filled which had the effect of suggesting that I was not being considered for the actual job I was seeking. I feel that an illegal preference for a woman in a specific work occupation did and still exists and this also includes illegal preference for males being considered for the job as a talk show host. In view of a possible FCC license review, & since the station is supposed to serve the public interest, I feel that I and other females are being discriminated against on the basis of sex which is in direct violation of Title VII of the Civil Rights Act of 1964, amended 1972.

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date _____ _____ (Sign your name)

Subscribed and sworn to before me this _____ day of _____ 196 _____

_____ (Name) _____ (Title)

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

FORM APP.: BUR. OF BUDGET—No. 124-R0001 FORM EEOC-5 (REV. 7-68)

17a Complaint (Exhibit A)

EXHIBIT A

[Title omitted in printing]

ANSWER TO COMPLAINT

FIRST DEFENSE

Plaintiff failed to pursue her State remedies as required by 42 U.S.C. §2000e-5(c). The Court, therefore, does not have jurisdiction of this case.

SECOND DEFENSE

The Complaint fails to state a claim against Defendant upon which relief may be granted.

THIRD DEFENSE

Defendant admits the averments contained in Paragraphs I and II of the Complaint to the extent that these averments show the statutory basis for invoking the jurisdiction of the Court and the nature of the action. Defendant denies that it engaged in any of the illegal acts for which Plaintiff seeks relief. Defendant admits the averments contained in Paragraphs II and IV, but

suggests that the proper statutory citation in Paragraph IV should be "42 U.S.C. §2000e(b)". The averments of Paragraph VI of the Complaint are denied as stated. Defendant admits that charges were filed with the Equal Employment Opportunity Commission and that the Commission issued a letter granting Plaintiff the right to bring this action. It is denied, however, that the Commission issued a determination that there was reasonable cause to believe that the charge of unlawful sex discrimination was true as regards the named Plaintiff. Rather, the Commission's determination related only to the class in general, and the Commission found that the named Plaintiff was not the victim of unlawful sex discrimination as an individual, but that her application for employment was denied because she was not qualified for the job.

Defendant denies the averments contained in Paragraphs VB, VII and IX of the Complaint.

FOURTH DEFENSE

Defendant denies the class action allegations contained in Paragraph V of of the Complaint, and asserts that this action is improperly brought as a class action and that Plaintiff is not an adequate representative of the class or classes she seeks to represent.

FIFTH DEFENSE

Members of the class who have not pursued administrative remedies are not entitled to damages.

SIXTH DEFENSE

Plaintiff is not qualified to hold the position of employment for which she applied regardless of her sex.

WHEREFORE, Defendant respectfully prays this Honorable Court for judgment against the Plaintiff, for costs of suit

and for reasonable attorney's fees under 42 U.S.C. §2000e-5(k).

s/Wendell G. Freeland
Wendell G. Freeland
Attorney for Defendant

CERTIFICATE OF SERVICE
[Certificate of Service omitted in printing]

Motion to Determine a Class Action

[Title omitted in printing]

NOTICE

TO: Wendell G. Freeland, Esquire
409 Plaza Building
Pittsburgh, Pa. 15219

Take notice that the within Motion to Determine a Class Action has been filed this date and will be considered at the discretion of the Court.

BASKIN, BOREMAN, WILNER
SACHS, GONDELMAN & CRAIG

By: s/Robert N. Hackett
Robert N. Hackett
Attorney for Plaintiff

Motion to Determine a Class Action

[Title omitted in printing]

MOTION TO DETERMINE CLASS ACTION

AND NOW COMES plaintiff, Jo Ann Evans Gardner, by her attorney, Robert N. Hackett, pursuant to local Rule 34c of the Rules of Court of the United States District Court for the Western District of Pennsylvania, and moves this court to determine a class action following anwers to interrogatories filed by the plaintiff and in support thereof sets forth the following:

1. Local Rule 34c of the Rules of Court of the United States District Court for the Western District of Pennsylvania states that within 90 days after the filing of a complaint in a class action that the plaintiff shall move for determination of a class under Rule 23c 1 of the Federal Rules of Civil Procedure.

2. The plaintiff has filed interrogatories to determine necessary information for the defendant in order to determine whether or not this action should proceed as a class action.

3. As soon as the defendant has answered the interrogatories with reference to this class action, the plaintiff moves this court to determine and certify this action as a class action under Federal Rule of Civil Procedure 23b 2.

Respectfully submitted

BASKIN, BOREMAN, WILNER
SACHS, GONDELMAN & CRAIG

By: s/Robert N. Hackett
Robert N. Hackett
Attorney for Plaintiff

CERTIFICATE OF SERVICE
[Certificate of Service omitted in printing]

[Title omitted in printing]

DEFENDANT'S ANSWERS TO INTERROGATORIES TO DEFENDANT WESTINGHOUSE BROADCASTING COMPANY IN ORDER TO DETERMINE A CLASS ACTION

AND NOW COMES the Defendant pursuant to the Federal Rules of Civil Procedure and submits the following Answers to Interrogatories addressed to the Defendant by the Plaintiff, JO ANN EVANS GARDNER.

I. Introduction

C. Each of the following Interrogatories is intended to be a continuing Interrogatory and Plaintiffs hereby demand that in the event at any later date the Defendants obtain any additional facts, or form any conclusions, opinions or contentions different from those set forth in their Answers to such Interrogatories such Defendants shall amend their Answers to such Interrogatories promptly, and sufficiently in advance of any trial, to fully set forth such differences.

Defendant objects to Plaintiff's

designation, in Section C of the Introduction, of the Interrogatories as continuing and requiring the Defendant to amend its Answer at any time between the date of filing the Answer to Interrogatories and the date of trial. Defendant asserts such designation of the Interrogatories as continuing in nature as being beyond the requirements of FR CP 26(e).

1. State your Corporate name and proper coporate headquarters and the proper address of the corporate offices in Pittsburgh if different than the corporate headquarters.

ANSWER: The Defendant is Westinghouse Broadcasting Company, whose corporate headquarters is 90 Park Avenue, New York, New York, 10016 and whose corporate office in Pittsburgh is Westinghouse Broadcasting Company, KDKA, One Gateway Center, Pittsburgh, Pennsylvania, 15222.

2. State the names of the various radio stations operated by you, the legal names and addresses of the

radio stations and the call letters of each radio station.

ANSWER: The Defendant, Westinghouse Broadcasting Company, owns and operates the following radio stations, each of which is known as Westinghouse Broadcasting Company and is further identified by the call letters under which it is registered with the FCC:

a. WBZ 1170 Soldiers Field Road, Boston, Mass. 02134;
b. WINS 90 Park Avenue, New York, New York 10016;
c. KYW Independence Mall, East, Philadelphia, Penna. 19106;
d. KDKA One Gateway Center, Pittsburgh, Penna. 15222;
e. WOWO 124 West Washington Blvd., Ft. Wayne, Ind. 46800;

f. WIND 625 No. Michigan Avenue, Chicago, Illinois 60611;

g. KFWB 6419 Hollywood Blve., Los Angeles, California 90028.

3. State the organization of each radio station including the departments such as programming, personnel, accounting (billing), sales, advertising, executive, public service, payroll, producer-directors, engineering, etc., and any other departments which each radio station may have. Include under programming or other appropriate categories the organization of "on the air" persons including talk show hosts, news broadcasters, sports broadcasters, disc jockies, etc.

ANSWER: Information submitted in response to Interrogatory Number 3 relates only to the organization of Westinghouse Broadcasting Company, KDKA Radio, One Gateway Center, Pittsburgh, Pennsylvania, 15222. Defendant objects to that part of Interrogatory Number 3 which relates to

radio stations other than Westinghouse Broadcasting Company, KDKA, Pittsburgh, Pennsylvania, as being not relevant to the subjuct [sic] matter of the action and as imposing an unduly burdensome and oppressive task upon the Defendant because the information necessary to answer this Interrogatory for radio stations other than Westinghouse Broadcasting Company, KDKA, Pittsburgh, Pennsylvania, is not available to the representative of the Defendant providing Answers to this Interrogatory.

The organization of Westinghouse Broadcasting Company, KDKA Radio, Pittsburgh, Pennsylvania, consists of the following departments:

A. Regional Vice President's Department;

B. General Manager's Department;

C. Editorial Writers' Department;

D. Personnel and Administrative Coordinator's Department;

E. Sales Department;

F. Promotion Department;

G. Business and General Services Department;

H. Engineering Department;

I. Programming Department;

J. News Department, which includes the News Director and all on-the-air news announcers;

K. Talent Department, which includes all announcers other than news announcers and specifically includes any and all talk show hosts, sports broadcasters and disc jockies.

4. State the number of female employees in the various departments of each radio station and identify the position and identify each female employee in the categories listed in question 3.

ANSWER: Information submitted in response to Interrogatory Number 4 relates only to the Westinghouse Broadcasting Company, KDKA Radio, One Gateway Center, Pittsburgh, Pennsylvania,

15222. Defendant objects to that part of Interrogatory Number 4 which relates to radio stations other than Westinghouse Broadcasting Company, KDKA, Pittsburgh, Pennsylvania, as being not relevant to the subject matter of the action and as imposing an unduly burdensome and oppressive task upon the Defendant because the information necessary to answer this Interrogatory for radio stations other than Westinghouse Broadcasting Company, KDKA, Pittsburgh, Pennsylvania, is not available to the representative of the Defendant providing Answers to this Interrogatory.

Westinghouse Broadcasting Company, KDKA Radio, Pittsburgh, Pennsylvania, employs the following female persons in various departments listed in response to Interrogatory Number 3:

A. Regional Vice President's Department - two (2) employees - one (1) female. Carol Allen - Secretary to an officer 8300 Ohio River Road,

Pittsburgh, PA 15202.

B. General Manager's Department -two (2) employees one (1) female. Jovina A. Eliszo -Secretary to General Manager 136 Sheridan Avenue, Apartment No. 109, Bellevue, Pennsylvania, 15202.

C. Editorial Writer's Department - two (2) employees - one (1) female. Mary L. Castillo - Secretary-Stenographer - Bigelow Hotel, Apartment No. 523, Bigelow Boulevard, Pittsburgh, PA 15219.

D. Personnel and Administrative Coordinator's Department -one (1) employee - one (1) female. Elizabeth Scott - Administrative and Personnel Coordinator - 715 Chess Street, Monongehela, Pennsylvania, 15603.

E. Sales Department - nine (9) employees - three (3) females. Marjorie Burger - Secretary -1200 Hazlett Road, Pittsburgh, Pennsylvania, 15227. Anne Donohoe - Account Executive - 5851 Morrowfield Avenue, Pittsburgh, PA 15217. Bonnie May - Account Executive - 839 Herberton Street, Pittsburgh, Pennsylvania, 15206.

F. Promotion Department - three (3) employees - three (3) females. Pamela Cleeland - Advertising and Sales Promotion Manager -944 Vista Glen Drive, Bet Park, Pennsylvania, 15102. Lois Elder - Traffic Correlator 2208 Chalfa Street, Pittsburgh, Pennsylvania, 15221. Lavita Mays - Clerk Typist -3025 Center Avenue, Pittsburgh,

Pennsylvania, 15219.

G. Business and General Services Department - eleven (11) employees - four (4) females. Ruth Vogel - Accounting Clerk - 111 Greenwood Drive, Pittsburgh, PA 15236. Alice Heidt - Janitor - 6637 Shetland Avenue, Pittsburgh, PA 15206. Helen Tumbas - Telephone Operator and Receptionist - 4143 Brownsville Road, Pittsburgh, PA 15227. Denise Welsh - Clerk Typist -320 Cliffside Manor, Apartment No. 41, Pittsburgh, PA 15202.

H. Engineering Department -eighteen (18) employees - one (1) female. Shirley Barnes - Technician -9822 Presidential Drive, Allison Park, Pennslyvania 15101.

I. Programming Department -

nine (9) employees - four (4) females. Ida Lee - Secretary - 59 Penn Circle West, Apartment U210, Pittsburgh, PA 15206. Janet Hrubic - Producer -119 Oakville Drive, Pittsburgh, PA 15220. Laura Hansen - Producer - 2210 William Penn Highway, Pittsburgh, PA 15235. Lenne Heaton - Producer -237 Meridian Road, Butler, PA 16001.

J. News Department - ten (10) employees - two (2) females. Eleanor Shano Conway - Staff Announcer - 1139 Greenridge Lane, Pittsburgh, PA 15229. Cynthia Taft Grano - Staff Announcer - 5859 Northumberland Street, Pittsburgh, PA 15217.

K. Talent Department - eleven (11) employees - seven (7) full time -

four (4) part time - No females.

5. If there are additional females employed by you not listed under question 4, identify each one and state the job or position held.

ANSWER: Information submitted in response to Interrogatory Number 5 relates only to Westinghouse Broadcasting Company, KDKA Radio, One Gateway Center, Pittsburgh, Pennsylvania, 15222. Defendant objects to that part of Interrogatory Number 5 which relates to radio stations other than Westinghouse Broadcasting Company, KDKA, Pittsburgh, Pennsylvania, as being not relevant to the subject matter of the action and as imposing an unduly burdensome and oppressive task upon the Defendant because the information necessary to answer this Interrogatory for radio stations other than Westinghouse Broadcasting Company, KDKA, Pittsburgh, Pennsylvania, is not available to the representative of the Defendant providing Answers to this Interrogatory.

Westinghouse Broadcasting Company, KDKA Radio, Pittsburgh, Pennsylvania, has, and does, on occasion employ the following females, who are regularly employed by KDKA TV, to make radio broadcasts:

A. Lee Arthur - Staff Announcer - Gateway Towers, Apartment 16F, Pittsburgh, PA 15222.

B. Yvonne Forston - Staff Announcer - 114 Rivercrest Drive, Corapolis, PA 15108.

C. Patricia Burns - Staff Announcer - 120 DuPont Circle, Pittsburgh, PA 15243.

6. State the number of female job applications from January 1, 1970 until the present and identify each job applicant.

ANSWER: Information submitted in response to Interrogatory Number 6 relates only to Westinghouse Broadcasting Company, KDKA Radio, One Gateway Center, Pittsburgh, Pennsylvania, 15222. Defendant

objects to that part of Interrogatory Number 6 which relates to radio stations other than Westinghouse Broadcasting Company, KDKA, Pittsburgh, Pennsylvania, as being not relevant to the subject matter of the action and as imposing an unduly burdensome and oppressive task upon the Defendant because the information necessary to answer this Interrogatory for radio stations other than Westinghouse Broadcasting Company, KDKA, Pittsburgh, Pennsylvania, is not available to the representative of the Defendant providing Answers to this Interrogatory.

Westinghouse Broadcasting Company, KDKA Radio, Pittsburgh, Pennsylvania, does not have records of job applicants from January of 1970 until the present time. Applications are retained for a period of 120 days from the date received by agreement with the Pennsylvania Human Relations Commission and unless renewed, are not, as a matter of policy, kept beyond that period. The available records indicate that 30 applications have been received

from females for employment by KDKA Radio as Follows [sic]:

KDKA-RADIO

NAME POSITION	DATE	ADDRESS
Scanlon, KA Writer/Reporter	5-15-75	210 Oakland Place North Wales, Pennsylvania 19454
Baker, Connie Reporter	5-21-75	3L-4754 Westwood Park Shreveport, Louisiana 71109
Grzybek, Anne M. Secretary	6-23-75	138 Elmwood Drive Glenshaw, Pennsylvania 15116
Erra, Diane M. Secretarial	6-11-75	404 East Garden Road Pittsburgh, Pennsylvania 15227

Katz, Shirley News Writer	5-12-75	2414 Marbury Road Pittsburgh, Pennsylvania 15221
Burgio, Karen News	6-4-75	403 Village in the Park 3001 Marshall Road Pittsburgh, Pennsylvania 15214
Summers, BJ News	5-31-75	K-8 Crabtree Crest Apt. 200 Six Forks Road Raleigh, N. Carolina 27509
Kerr, Barbara Reporter	5-27-75	1763 Quigg Drive Pittsburgh, Pennsylvania 15241

Chute, Eleanor Reporter	3-11-75	1143 Jackson Street Pittsburgh, Pennsylvania 15221
Yundt, N. Financial Adm.	3-10-75	204 S. Green Lane Zelienople, Pennsylvania 16063
Hardin, B. Announcer	3-3-75	533 9th Street Clairton, Pennsylvania
Guthrie, KM Radio Broadcasting	3-20-75	225 Waldorf Street Pittsburgh, Pennsylvania 15214
Lee, EL Writer	3-20-75	6325 Phillips Avenue Pittsburgh, Pennsylvania 15217

Penoc, JA Promotion	3-3-75	2251 Ramsey Road Monroeville, Pennsylvania 15146
Santus, S. News Reporter	3-20-75	RD #4 Indiana, Pennsylvania 15701
Godfrey, PA Newscaster-Journalist		1186 Hilltop Drive Akron, Ohio 44310
Kinsel, L. Journalist	3-75	103 Eton Drive Pittsburgh, Pennsylva-ia 15215
Throp, C. Journalist		3282 St. Ignatius Place Santa Clara, California 95051

Haye, L. News Reporter		1064 Mississippi Avenue Mt. Lebanon, Pennsylvania 15216
Gaydos, J. Production	2-28-75	2036 N. Walnut 18C Bloomington, Indiana 47401
Judd, Jackie News Department	6-75	88 South State Street Concord, NH 03301
Sirockman, Victoria E. Traffic	5-15-75	1900 Westmont Avenue Pittsburgh, Pennsylvania 15210
Drake, Toni J. Public Relations	4-28-75	25 Cedricton Street Pittsburgh, Pennsylvania 15210

Jarkiewicz, Kathleen Accounting	5-2-75	5117 Azalea Drive Pittsburgh, Pennsylvania 15236
Kukurin, Daren Promotions	4-25-75	Beaver Hills Apts. 304 State College, Pennsylvania 16801
	5-1-75	3536 Ridgewood Drive
Powell, Wendy Engineering	4-29-75	140 Cottage Street New Bedford, Mass. 02740
Shutok, LC Journalist	4-12-75	38 Lexington Avenue Uniontown, Pennsylvania 15401

Grano, Cynthia T. Radio Newsperson	5-2-75	5859 Northumberland Pittsburgh, Pennsylvania 15219
Byington, Stacey J. News Writer	3-2-75	5700 Bryant Street #4 Pittsburgh, Pennsylvania 15206
McCabe, Irene Talk Show Host	4-4-75	1024 Suter Road Glenshaw, Pennsylvania

During the period for which records are available, Westinghouse Broadcasting Company received applications from 291 females who did not specifically indicate whether their application related to KDKA Radio of [sic] KDKA TV. Information as to those applicants follows:

NO SPECIFICATION

NAME POSITION	DATE	ADDRESS
Quigley, MG Reporter	2-25-75	3131 Terrace Pittsburgh, Pennsylvania 15213
Paterson, GK Broadcasting	2-7-75	105 Kings Pt. Drive Glenshaw, Pennsylvania 15116
Adamcik, DM Secretarial	2-14-75	505 Vulcan Street McKees Rocks, Pennsylvania 15136
Williamson, SL Open	2-17-75	1403 Hunter Street Pittsburgh, Pennsylvania 15221

Sosso, LS Secretary	2-14-75	4109 Surrye Drive Allison Park, Pennsylvania 15101
Spisak, RJ Production	2-13-75	717 State Street New Kensington, Pennsylvania 15068
Hartz, PA Secretarial	2-5-75	2429 Cobden Street Pittsburgh, Pennsylvania 15203
Long, CL Mail Clerk		410 Dawson Avenue Bellevue, Pennsylvania
Kegges, MJ Bookkeeping	1-31-75	8237 Nadine Road Verona, Pennsylvania 15147

Clements, CS Newsroom Asst.		705 McCoy Road McKees Rocks, Pennsylvania 15136
Cooper, LA Secretarial	2-1-75	7879 Mark Drive Verona, Pennsylvania 15147
Markus, DF Clerical	2-14-75	4837 Hatfield Street Pittsburgh, Pennsylvania 15201
Edmonson, KB Secretary	2-19-75	86 N. Harrison Avenue Pittsburgh, Pennsylvania 15202
Potts, NG Communications	2-14-75	923 Miami Avenue Pittsburgh, Pennsylvania 15228

Coleman, JA	2-21-75	RD #3 Box 261-L Greensburg, Pennsylvania 15601
Allen, Suzanne R. Advertising	3-26-75	121 Marian Avenue Glenshaw, Pennsylvania 15116
Capozzi, Mary J. Writer	4-1-75	1453 Stoltz Road Bethel Park, Pennsylvania 15102
Gesler, Christie E. Broadcast Promotion	3-3-75	5873 Hobart Street Pittsburgh, Pennsylvania 15217
Glynn, Cynthia L. Broadcast Promotion	2-23-75	716 Crucible Street Pittsburgh, Pennsylvania 15220

Williams, Karen L. News Writer	2-21-75	211 Shackelford Drive Monroeville, Pennsylvania 15146
Mikesell, Suzanne R. Secretarial	4-22-75	243 Poplar Street Monroeville, Pennsylvania 15146
Drozak, Janet D. Receptionist	4-2-75	23 Harrison Pittsburgh, Pennsylvania 15205
Moore, Mary L. Mailroom	4-2-75	23 Harrison Pittsburgh, Pennsylvania 15205
Pauley, Linda M. Anything	4-2-75	11 Warriors Road Pittsburgh, Pennsylvania 15205

Parrish, Patricia M. General Office	4-2-75	214 Dinwiddie Street Pittsburgh, Pennsylvania 15219
Mayni, Janice Clerical Work	3-25-75	225 Magnolia Whitaker, Pennsylvania 15120
Trapani, Mary Cleaning	3-17-75	4776 Sciota Street Pittsburgh, Pennsylvania 15224
Rickwal, Suzanne Broadcast Promotion	2-23-75	245 Academy Avenue Pittsburgh, Pennsylvania 15228
Katonik, Carol A. Broadcast Promotion	4-75	309 Halket Street Pittsburgh, Pennsylvania 15213

Fishman, Margaret E. Broadcast Promotion	2-27-75	2130 Wightman Street Pittsburgh, Pennsylvania 15217
Brandes, Jan L. Broadcast Promotion	2-25-75	51 E. Sandun Ct. Pittsburgh, Pennsylvania 15239
Grupp, Marcia S. Broadcast Promotion	2-22-75	911 Country Club Drive Mt. Lebanon, Pennsylvania 15228
Ligato, Lorraine C.	4-75	423 Elm Street Slippery Rock, Pennsylvania 16057
Drew, KE Writing	4-75	2000 Texdale Avenue Pittsburgh, Pennsylvania 15216

Abrams, PL Promotion	2-25-75	5700 Bunkerhill Road Pittsburgh, Pennsylvania 15206
Wertz, Cynthia, H. Anything	3-24-75	1326 Woodland Monroeville, Pennsylvania 15146
Laulicut, Nancy S. Newswriting	4-75	1420 Barnsdale Street Pittsburgh, Pennsylvania 15217
Pesta, Mabel	3-24-75	509 Franklin Street E. Pittsburgh, Pennsylvania 15112
Maher, Marcia C. Technical	4-75	1330 Sun Ridge Drive Pittsburgh, Pennsylvania 15241

Martin, Sherrie L. General Office	3-18-75	728 Anaheim Street Pittsburgh, Pennsylvania 15219
Williams, Patricia A. Switchb oard [sic] Operator	7-16-75	1040 Brushton Avenue Pittsburgh, Pennsylvania 15208
DeCourcy, Dara A. Admin. Asst.	2-24-75	924 Old Hills Road Boston, Pennsylvania 15135
Kish, Ester M. Broadcast Promotion	3-1-75	3888 Mayfair Pittsburgh, Pennsylvania 15204

Johnson, Harriet, R. Admin. Clerk	3-1-75	105 Dilworth Street Pittsburgh, Pennsylvania 15211
Brubaker, Linda J. Broadcast Promotion		9813 Presidential Drive Allison Park, Pennsylvania 15101
Jackson, Judith Promotions	3-7-75	204B Glen Andrews Drive Glenshaw, Pennsylvania 15116
Scott, Rosanne C.	4-75	3839 Dalewood Avenue Pittsburgh, Pennsylvania 15227
Peters, Patricia D. Broadcast Promotion	3-3-75	815 Library Avenue Carnegie, Pennsylvania 15106

Fanion, Cheryl	4-74	1312 Elm Street Pittsburgh, Pennsylvania 15221
Jefferson, Doris C.	4-75	7725 Kelly Street Pittsburgh, Pennsylvania
O'Brien, Jean E. Management	3-27-75	Box 215 Manorville, Pennsylvania 16238
Weiss, Madeline Broadcast Promotion	2-25-75	565 East End Avenue Pittsburgh, Pennsylvania 15221
Vignovich, Dianne L. Broadcast Promotion	2-25-75	2011 Irwin Street Aliquippa, Pennsylvania 15001

Connelly, Carol A.	4-75	105 Ardennes Ct. Trafford, Pennsylvania 15085
Fuoco, Patricia Broadcast Promotions	2-25-75	1063 Greenbriar Road Bethel Park, Pennsylvania 15102
Maloney, Kathleen E. Broadcast Promotions	2-24-75	1441 Blossom Hill Road Pittsburgh, Pennsylvania 15234
Miller, Deborah R.	3-6-75	628 Dorseyville Road Pittsburgh, Pennsylvania 15238
Richardson, AJ Communications	2-5-75	2249 Laurel Lane Allison Park, Pennsylvania 15101

Necheff, A. Clerical		208 Acme Avenue Cheswick, Pennsylvania 15024
Channell, K, Announcer		207 Hite Avenue Fairmont, W. VA 26554
Allnock, TE Secretary	3-18-75	1005 Bernice Drive Allison Park, Pennsylvania
Harms, HL Receptionist	3-17-75	Box C 2544 Lewisburg, Pennsylvania 17837
Sodini, C. Receptionist	3-24-75	717 Highway Road Pittsburgh, Pennsylvania 15234

Cloherty, BJ Management	3-25-75	2523 Duquesne Avenue W. Mifflin, Pennsylvania 15122
Magnus, BK Secretarial	3-25-75	18 Rivera Road Pittsburgh, Pennsylvania 15239
Mitchell, GA Office Work	3-28-75	4452 Sweetbay New Homestead, Pennsylvania 15120
Ford, BA Accounting	3-31-75	108 Sheffield Drive Irwin, Pennsylvania 15642
Hense, ME Receptionist	3-27-75	2380 Hidden Timber Drive Upper St. Clair, Pennsylvania

Odonnell, KL Secretary	3-18-75	280 Denver Drive McKees Rocks, Pennsylvania
Alexa Coussoule Communications	2-28-75	205 Gilkeson Road Pittsburgh, Pennsylvania 15228
Creque, FH Management		139 Clesterfield Road Pittsburgh, Pennsylvania 15213
Keck, JW Marketing		598 Farview Drive Greenburg, Pennsylvania 15601
Hamilton, LN Secretarial	3-4-74	4027 Grizella Street Pittsburgh, Pennsylvania 15214

Brietic, KL Anything	3-7-75	4374 Homestead Duq. Road Munhall, Pennsylvania 15102
Lewis, D. Clerical	3-7-75	190 Luthrop Street Pittsburgh, Pennsylvania 15213
Conroy, CA Anything	3-10-75	570 Carriage Circle Pittsburgh, Pennsylvania 15205
Moone, PA Secretarial	3-11-75	260 Robinson Street Pittsburgh, Pennsylvania 15213
Staffell, ME Communications	3-10-75	3464 Treeline Drive Murrysville, Pennsylvania 15668

Howe, CA Production	3-13-75	2527 Poinsella Drive McKeesport, Pennsylvania
Baer, DJ Communications	3-13-75	107 Shippen Drive Coraopolis, Pennsylvania
Kosic, DL Production	3-13-75	3415 Beechwood Blvd. Pittsburgh, Pennsylvania 15217
Brown, RV Secretarial	3-11-75	633 Montelair Street Pittsburgh, Pennsylvania 15217
Stewart, GJ Clerk-Typist	3-4-75	4458 Scherling Street Pittsburgh, Pennsylvania 15214

Zurawka, MB Secretarial	3-5-75	1488 Highland Villa Drive Pittsburgh, Pennsylvania 15234
Sims, RG Secretarial	3-5-75	809 Alden Drive Pittsburgh, Pennsylvania 15220
Travis, LE News Writer	3-5-75	5375 Overland Trial [sic] Pittsburgh, Pennsylvania 15236
Whitner, MA Production Asst.	3-5-75	RD 1 Box 249 Gibsonia, Pennsylvania
Ellis, A. Producer/Director	3-5-75	5841 Ferree Street Pittsburgh, Pennsylvania 15217

Uhlig, RA News Reporter	3-5-75	2387 Oakview Drive Pittsburgh, Pennsylvania 15237
Pivik, WJ Receptionist	3-5-75	119 Halliford Drive Pittsburgh, Pennsylvania 15235
Gontscharon, H. Librian	3-6-75	1811 Locust Street Pittsburgh, Pennsylvania 15219
Marchuska, MA Receptionist	3-6-75	1642 Charlton Heights Coraopolis, Pennsylvania 15108
Kalla, SA Advertising	2-25-75	124 Marion Street Munhall, Pennsylvania 15120

Schaefers, CJ Secretarial	2-28-75	863 Rosalino Road Pittsburgh, Pennsylvania 15237
Glynn, CL Promotion	3-3-75	716 Crucible Street Pittsburgh, Pennsylvania 15220
Nelson, TD Clerical	1-27-75	7 E Hillstown Houses Eymard Street Pittsburgh, Pennsylvania 15221
Fitzgerald, SA Anything	1-28-75	1036 Windermere Drive Pittsburgh, Pennsylvania 15218

Perkins, SM Personnel	1-18-75	220 Ridge Avenue New Kensington, Pennsylvania 15068
Matisz, PK Secretarial	1-28-75	163 North Street Springdale, Pennsylvania 15144
Brenzie, Judith A. Secretarial	1-28-75	730 S. Negley #20 Pittsburgh, Pennsylvania 15232
Arnold, JF Communications	1-23-75	5819 Fifth Avenue Pittsburgh, Pennsylvania 15232
Bailey, PJ Exec. Secretary	1-20-75	1110 Herr Street Pittsburgh, Pennsylvania 15221

Hasapes, NJ	1-24-75	3415 Parkview Avenue Pittsburgh, Pennsylvania 15213
McCarthy, SJ Clerk	1-17-75	1035 Woodbourne Avenue Pittsburgh, Pennsylvania 15226
Gilliam, M Clerk		546 Village Road Pittsburgh, Pennsylvania 15202
Klein, PM Secretarial	1-23-75	2116 Edwareds Street Bethel Park, Pennsylvania
Kelly, KA Anything	1-11-75	1145 Davis Avenue Pittsburgh, Pennsylvania 15212

Sabatino, RK Clerical		38 Broadway N. Irwin, Pennsylvania
Martin, EF Secretarial	1-9-75	3301 Charlemagne Circle Pittsburgh, Pennsylvania 15237
Bronz, CA Reporter	1-20-75	801 Thorn Street Sewickley, Pennsylvania 15143
Tomsic, SA Secretarial	1-22-75	6112 Roy Street Finleyville, Pennsylvania
Markosek, MA Clerical	1-12-75	2023 Elmbrook Lane Pittsburgh, Pennsylvania 15243

McGuire, Karen A. Public Relations	1-17-75	767 Narrows Run Road Coraopolis, Pennsylvania 15108
Lee, AL Summer Student	1-16-75	1257 Paulson Avenue Pittsburgh, Pennsylvania 15206
Wright, Gwendolyn Clerical	12-14-74	117 Sykline Drive Pittsburgh, Pennslylvania 15239
Capozzi, MJ Writer	1-13-75	1453 Stoltz Road Bethel Park, Pennsylvania 15102
Wergin, GS Writer	1-14-75	RD #6 Irwin, Pennsylvania

Pototo, DL Clerical	1-10-75	200 Glenwood Pittsburgh, Pennsylvania 15207
Hyde, LA Clerical	1-3-75	24 Grand Avenue Pittsburgh, Pennsylvania 15225
Elder, JD Librarian	1-10-75	4716 Ellsworth Avenue Pittsburgh, Pennsylvania 15213
Blye, Elaine Anything	1-9-75	7709 Bennette Street Pittsburgh, Pennsylvania 15208
Ferretti, VS Writer	1-14-75	RD 1 Box 402 Belle Vernon, Pennsylvania 15012

Turnipseed, LE Typist	1-14-75	7058 Apple Avenue Pittsburgh, Pennsylvania 15206
Perich, BA Receptionist		219 Rising Main Avenue Pittsburgh, Pennsylvania 15212
Howitz, DA Writer	1-13-75	435 Cole RD Sarver, Pennsylvania
Wisniewski, MG Anything	1-10-75	245 W. Stueben Street Pittsburgh, Pennsylvania 15205
Kim, NA Secretary	1-9-75	121 Philomena Drive Coraopolis, Pennsylvania 15108

Palmieri, L. Secretary		745 McCaslin Street Pittsburgh, Pennsylvania 15217
Mather, BA Sales	1-6-75	Peters Road Ligioner, Pennsylvania 15658
Palmieri, L. Secretarial	1-7-75	745 McCaslin Street Pittsburgh, Pennsylvania 15217
Carr, EM Secretarial		133 Lee Street Carnegie, Pennsylvania 15106
Glabick, LA Secretary	1-16-75	4301 Upviewter Pittsburgh, Pennsylvania 15201

Randall, A. Typist	1-15-75	6917 Frankstown Avenue Pittsburgh, Pennsylvania 15208
Davis, CJ Secretarial	1-2-75	220 N. Jackson Avenue Pittsburgh, Pennsylvania 15202
Harris, L. Typist	1-6-75	5332 Cornwall Street Pittsburgh, Pennsylvania 15224
Sherriff, P.	1-3-75	329 Oaklawn Drive Pittsburgh, Pennsylvania 15241
Fabian, LD Secretary	1-29-75	Box 243 I Imperial, Pennsylvania

Coy, Judith Typist	1-8-75	727 Bryn Mawr Road Pittsburgh, Pennsylvania 15219
Young, AC Sales	1-10-75	628 Washington Avenue Oakmont, Pennsylvania 15139
Williams, MJ Accounting	1-15-75	7403 Stranahan Pittsburgh, Pennsylvania 15206
Chick, KE Personnel	1-6-75	417 Cresent Gardens Drive Pittsburgh, Pennsylvania 15235
Menzer, S.	1-7-75	RD #1, Venetia Road Venetia, Pennsylvania 15367

Homnack, Martha R. Secretary	5-22-75	180 S. Lincoln Avenue Beaver, Pennsylvania
Karas, Marlene Reporter	5-29-75	800 Beaver Road Ambridge, Pennsylvania 15003
Zyski, Kathleen M. Secretarial	5-29-75	920 Summit Avenue Monessen, Pennsylvania 15062
Lyles, Beatrice M. Production	5-28-75	329 South First Street Duquesne, Pennsylvania
Berg, Wanda K. Secretarial	5-27-75	707 Penn Avenue Oakmont, Pennsylvania 15139

Donati, Diane L. Anything	5-27-75	RD #2 Box 86 Burgettstown, Pennsylvania
McCoy, Gloria J. Marketing	5-22-75	1805 Cliff Street Pittsburgh, Pennsylvania 15219
Scuilti, Linda M. Receptionist	5-22-75	2557 Ivyglen Street Pittsburgh, Pennsylvania 15227
Mielcarek, Dolores L. Receptionist	5-22-75	1821 Mt. Joseph Street Pittsburgh, Pennsylvania 15210
Dyles, Elaine E. Mail Room Clerk	5-22-75	3507 Frazier Street Pittsburgh, Pennsylvania

Boggess, Claire A. Clerk Typist	5-5-75	612 Montour Street Coraopolis, Pennsylvania 15108
Winston, Vickie Exploratory	5-75	17017 Biltmore Avenue Cleveland, Ohio 44123
Marsden, Karen H. Newscaster	5-75	1341 Beechwood Boulevard Pittsburgh, Pennsylvania 15217
King, Lattie	5-75	839 Grant Street Braddock, Pennsylvania 15104
Stewart, Cynthia Reporter	5-12-75	7959 Remington Pittsburgh, Pennsylvania 15237

Berdan, Debra E. Writer	5-10-75	1035 Hale Street Pottstown, Pennsylvania 19464
Shaw, Pamela L. Clerical	5-5-75	433-1 Spring Run Road Coraopolis, Pennsylvania 15108
Hines, Imogene A. Producer	5-5-75	105 Mark Twain Drive Glenshaw, Pennsylvania
Whalen, Dana E. Journalism	5-75	590 Wethersfield Avenue Hartfor, [sic] Conn. 06114
Craver, Judy A. Clerical	5-6-75	501 Fourth Street Braddock, Pennsylvania 15104

Nagy, Joanne S. Secretary	5-6-75	174 Richard Drive Glenshaw, Pennsylvania
Kleer, Frances A. Dictaphone Typist	5-7-75	29 North Emily Pittsburgh, Pennsylvania
Zetwo, Mary A. Public Relations	5-31-75	2327 Wells Drive Bethel Park, Pennsylvania 15102
Kinkins, Kim D. Receptionist	5-9-75	144 Maryland Avenue West Mifflin, Pennsylvania
Siena, Debora M. Secretary	5-19-75	1710 Main Street Pittsburgh, Pennsylvania 15215

Horton, Wendy S. Typist	5-19-75	3741 Woodrow Avenue Pittsburgh, Pennsylvania 15227
Antonelli, Jan B. Broadcasting	5-13-75	73 West Manilla Avenue Pittsburgh, Pennsylvania 15220
Rosol, Joanne M. Secretarial	5-14-75	4909 Centre Avenue Pittsburgh, Pennsylvania 15213
Tetenauer, Carol Clerical	5-12-75	425 Susanna Pittsburgh, Pennsylvania 15207
Spokane, Susan L. Promotion	4-24-75	107 Queenston Drive Pittsburgh, Pennsylvania 15235

Ratliff, Carol L. Writer	5-75	Chatham College, Pittsburgh, Pennsylvania
Drevitch, Sharon A. Anything	5-9-75	207 Poplar Grove Pittsburgh, Pennsylvania 15210
Vallone, Catherine R. Anything (Typing)	5-9-75	136 East Agnew Pittsburgh, Pennsylvania 15210
Fleming, Edith J. Receptionist	5-9-75	102 Maryland Avenue W. Mifflin, Pennsylvania 15122
Brown, Lynda N. Secretary	5-22-75	241 Brighton Road Pittsburgh, Pennsylvania 15237

Gregory, Rita E. Mail Clerk	5-20-75	6909 Mt. Vernon Street Pittsburgh, Pennsylvania 15208
Dalton, Jacquelyn L. Mail Clerk	5-20-75	224 Marshall Avenue Pittsburgh, Pennsylvania 15214
Weilgomas, Doreen Clerical	5-20-75	4019 Swanson Street Pittsburgh, Pennsylvania 15214
Foster, Roberta J. Messenger	5-20-75	318 Union Street Monongahela, Pennsylvania
Lee, Barbara J. Messenger	5-20-75	RD #2 Minog Ch. Road Finleyville, Pennsylvania

Beal, Martha B. Personnel	5-21-75	209 W. Spruce Street Titusville, Pennsylvania 16354
Ohnhaus, Deborah A. Secretarial	5-21-75	410 St. Joseph Street Pittsburgh, Pennsylvania 15210
Jamison, Margaret		Pittsburgh, Pennsylvania 15235
Majestic, Karen M. Advertising	4-21-75	1642 Methlyl Street Pittsburgh, Pennsylvania 15216
Vogel, Louise C. Production Asst	5-75	949 N. 9th Street Reading, Pennsylvania 19604

Mate, Dorothy Telephone Operator	4-21-75	5021 Aspen Street W. Mifflin, Pennsylvania 15122
Manko, Helen M. Accountant	5-30-75	121 Hornaday Road Pittsburgh, Pennsylvania 15210
Poleski, Joan L. Clerk-Typist	5-22-75	2915 Daniels Street Pittsburgh, Pennsylvania 15210
Owen, Cynthia Louise Clerical-Typist	5-22-75	1913 Fairland Street Pittsburgh, Pennsylvania 15210
Colbert, Karen A. Secretarial	5-22-75	98 North Joslyn Drive Pittsburgh, Pennsylvania 15235

Sulzer, BA Public Relations	4-14-75	135 Mallard Drive McKees Rocks, Pennsylvania
Oneill, SL Marketing	4-15-75	24 Oakville Ct. Pittsburgh, Pennsylvania 15220
McWilson EG Clerical	4-75	1218 Ann Street Homestead, Pennsylvania 15120
Dadey, DG Broadcast Promotion	2-24-75	201 Woodridge Drive Carnegie, Pennsylvania 15106
Whitake, CA Clerical	4-29-75	320 Ohio River Boulevard Sewickley, Pennsylvania 15143

Mramor, PA Public Relations	4-16-75	659 Somerville Pittsburgh, Pennsylvania 15243
Klauschev, BL Production	4-16-75	2193 Grandview Avenue Clev. Heights, Ohio 44106
Alexander, RL Computer Programmer	4-22-75	Box 99 McVey Street Sturgeon, Pennsylvania
Sopko, SJ Receiptionist	4-14-75	1431 Orr Drive Pittsburgh, Pennsylvania 15234
Hoffman, DJ Typist	4-17-75	507 Chestnut Street Carnegie, Pennsylvania 15106

Luptak, JM Secretarial	4-9-75	1020 Lincoln Avenue Duquesne, Pennsylvania
Boone, RS Advertising	4-10-75	5704 Wellesley Avenue Pittsburgh, Pennsylvania 15206
White, KE Billing Clerk	4-2-75	430 Lincoln Avenue Pittsburgh, Pennsylvania 15206
Nelson, BJ General Office	3-24-75	440 Michigan Street Pittsburgh, Pennsylvania 15210
Gatto, MA General Office	4-8-75	434 Parkridge Drive Pittsburgh, Pennsylvania 15235

Veronesi, SV Production Asst.	5-8-75	3206 Wagner Road Allison Park, Pennsylvania
Gramc, MJ Clerical	4-7-75	2106 Lautner Street. Pittsburgh, Pennsylvania 15212
Kenski, SM Sales	4-15-75	5888 Glen Hill Drive Bethel Park, Pennsylvania 15102
Fleming, DD Clerical	4-24-75	102 Maryland Avenue W. Mifflin, Pennsylvania 15122
Hrindac, DE Anything	4-23-75	RD #1 Box 238 Cannonsburg, Pennsylvania 15317

Nemesh, BA Public Relations	2-7-75	125 Castner Avenue Donora, Pennsylvania 15033
Fowler, HR Secretary	3-27-75	447 Bedford Avenue Rochester, Pennsylvania 15074
Sodini, C. Receptionist	3-24-75	717 Highview Road Pittsburgh, Pennsylvania 15234
Broz, CA Reporter	2-75	801 Thorn Street Sewickley, Pennsylvania 15143
Waugh, AD Promotion	2-23-75	7039 Meade Place Pittsburgh, Pennsylvania 15208

Scott, AM Promotion	2-28-75	409 John Street Pittsburgh, Pennsylvania 15212
Carpenter, PL Exec. Secretary	3-31-75	550 Simpson, Eowell Road Elizabeth, Pennsylvania 15037
Lamagna, EM Copywriter	3-29-75	607 Saxonburg Road Pittsburgh, Pennsylvania 15238
Berletic, DR General Mgmt.	4-12-75	956 Church Street Indianna, Pennsylvania 15701
Kascak, K. Stenographer	4-4-75	4426 Glencarin Street W. Mifflin, Pennsylvania 15122

Sloss, RA Secretarial	4-4-75	1707 Worton Boulevard W. Mifflin, Pennsylvania 15122
Braunstein, M. Broadcast Media	4-8-75	3014 Frederick Street Pittsburgh, Pennsylvania 15212
Wentzel, SL Secretary	4-25-75	501 Millers Lane Pittsburgh, Pennsylvania 15239
Morgan, EM Announcer	4-21-74	7524 Elk Road Pittsburgh, Pennsylvania 15235
Deasy, DA Writer	4-28-75	2709 Champlain Drive Pittsburgh, Pennsylvania

Gealy, SH Advertising	3-4-75	337 Delano Drive Pittsburgh, Pennsylvania 15236
McInerney, S. Promotion	3-28-75	300 Carnegie Place Pittsburgh, Pennsylvania 15208
Roach, BA Clerical	4-3-75	7926 Madria Pittsburgh, Pennsylvania
Hill, LP Acctg. Clerk	4-7-75	4924 Jordan Way Pittsburgh, Pennsylvania 15224
Macklin, L. Asst. Dir/Pro.	6-12-75	136 Wabash Avenue Pittsburgh, Pennsylvania 15220

Gardner, AM Clerical	4-24-75	3321 Virginia W. Mifflin, Pennsylvania
Kriss, E. Secretarial	4-22-75	99 South 19th Street Pittsburgh, Pennsylvania 15203
Lardy, EA Accounting	4-17-75	237 Walnut Street Sewickley, Pennsylvania
Boyl, AE Anything	4-14-75	1060 Marwood Avenue Pittsburgh, Pennsylvania 15213
Kosarich, D. Technical	4-14-75	144 Foxcraft Road Pittsburgh, Pennsylvania 15220

Bates, KJ Anything	4-15-75	660 Charett Place Sewickley, Pennsylvania 15143
Jones, LA Secretary	4-21-75	Golden Grove Road Baden, Pennsylvania 15005
Lagambo, CL Secretary	4-12-75	836 Lindenwood Drive Pittsburgh, Pennsylvania
Stadulis, AT Clerical		427 Stadium Street Pittsburgh, Pennsylvania 15204
Wilson, PJ Secretary	4-5-75	7233 Penn Avenue #5A Pittsburgh, Pennsylvania 15208

Larkin, DV Accounting		902 Cedarwood Drive Pittsburgh, Pennsylvania 15235
Ruffin, DE News	3-31-75	525 N. Fairmont Pittsburgh, Pennsylvania 15206
Ward, TL Technician	4-75	100-26 Dekruit Place Bronx, New York 10475
Dutro, J. Promotions	2-8-75	5469 Bartlett Pittsburgh, Pennsylvania 15217
Phillips, Marian Secretarial	6-2-75	Anderson Road, RD #1 Clinton, Pennsylvania 15025

Trainor, Jill E. Consumer Staff Position	6-2-75	3029 Hebron Drive Pittsburgh, Pennsylvania 15235
Prokich, Michele D. Secretarial	6-2-75	804 Fioelity Drive Pittsburgh, Pennsylvania 15236
Saunders, Sharon R. Anything	5-5-75	7340 Hamilton Avenue Pittsburgh, Pennsylvania 15208
Caruthers, Kathleen Public Relations	6-4-75	Rosslyn Road Carnegie, Pennsylvania 15106
Charnock, Diane R. Accounting	6-9-75	6535 Church Avenue Pittsburgh, Pennsylvania 15202

Klauscher, Barbara L. Production	6-10-75	1033 Farragut Street Pittsburgh, Pennsylvania 16206
Carlisle, Irene S. Switchboard	6-9-75	91 Sunnydale Dr., RD #4 Mars, Pennsylvania 16046
West, Donna Accounting	5-29-75	914 Beech Avenue Pittsburgh, Pennsylvania 15233
Hollas, Elizabeth M. Accounting	6-75	828 Rebecca Avenue Pittsburgh, Pennsylvania 15221
Terzis, Kathryn Accounting	6-2-75	1507 Merrick Avenue Pittsburgh, Pennsylvania 15226

Warren, Emogene Adm. Management	6-75	5700 Ellsworth Avenue #D8 Pittsburgh, Pennsylvania 15232
Jarkiewicz, Kathleen A. Financial Accountant	5-30-75	5117 Azalea Drive Pittsburgh, Pennsylvania 15236
Manko, Helen M. Bookkeeper	6-75	121 Hornaday Road Pittsburgh, Pennsylvania 15210
Sniderman, Bernice Accountant	5-30-75	1323 Wightman Street Pittsburgh, Pennsylvania 15217
Exler, Nancy M.	6-75	259 Lilac Drive Monroeville, Pennsylvania 15146

Cappelli, Mary H. Accounting	5-31-75	3930 Brownsville Road Pittsburgh, Pennsylvania 15227
Bukovan, Joan Clerk-Steno.	6-5-75	1946 Lowrie Street Pittsburgh, Pennsylvania 15212
Hartley, Nancy A. Clerical	6-10-75	4372 Mt. Royal Boulevard Allison Park, Pennsylvania
Lynn, Karen Anything	5-29-75	325 South River Street Wilkes-Barr,[sic] Pennsylvania 18702
Dolan, Karen E. News Reporter	6-4-75	3730 Orpwood Street Pittsburgh, Pennsylvania 15213

Bertolino, Deborah Secretarial	6-25-75	1725 Sarah Street Pittsburgh, Pennsylvania 15203
Warren, Toni R. Anything	6-17-75	7163 Upland Street Pittsburgh, Pennsylvania 15208
Lamagna, Ellen M. Typist	6-11-75	607 Saxonburg Road Pittsburgh, Pennsylvania 15238
Kretschmaier, Cathy Receptionist	6-11-75	123 Lily Drive Glenshaw, Pennsylvania
Chavis, Marie R. Secretary	6-7-75	413-D Glen Malcolm Drive Glenshaw, Pennsylvania 15116

Bughman, Catherine L. Accounting	6-75	Hemlock House Star Route Rector, Pennsylvania 15677
Berecek, Donna J. Exec. Secretary	6-13-75	1470 Ridge Road Ambridge, Pennsylvania 15003
Montgomery, Pamela A. Secretarial	6-16-75	1103 Jennylind Street McKeesport, Pennsylvania 15132
Calloway, Sharon L.	4-11-75	RD #4 Box 142 Uniontown, Pennsylvania 15401
Ahbez, Angela Anything	4-12-75	236 N. Graham Street Pittsburgh, Pennsylvania 15206

Guckert, Kathy Financial Accountant	6-8-75	1500 Evergreen Avenue Pittsburgh, Pennsylvania 15209
Greco, Donna R. Advertising	6-17-75	133 Woodshire Drive Pittsburgh, Pennsylvania 15215
Horgan, Beth A. News Researcher	6-18-75	4111 Superior Street Munhall, Pennsylvania
Kelly, Rebecca C. News Production	6-75	813 Somerville Drive Pittsburgh, Pennsylvania 15243
Whittaker, Frances M. Errand Girl	6-26-75	933 Woodlow Street Pittsburgh, Pennsylvania 15205

Ruhling, Roberta L. Receptionist	6-26-75	2243 Lucina Avenue Pittsburgh, Pennsylvania 15210
Yunk, Sharon L. Receptionist	6-25-75	1143 Vivjon Drive W. Homestead, Pennsylvania 15120
Gibson, Movne K. Newsroom Trainee	6-25-75	519 Zulema Street Pittsburgh, Pennsylvania 15213
Tarasi, Susan L. Receptionist		940 Beaver Street Sewickley, Pennsylvania 15143
Bowden, Patrice L. Personnel	6-24-75	612 Flint Road Allison Park, Pennsylvania

Bigelow Hotel #523 Bigelow Boulevard Pittsburgh, Pennsylvania 15219		
1139 Greenridge Lane Pittsburgh, Pennsylvania 15220		
3025 Centre Avenue Pittsburgh, Pennsylvania 15219		
Castillo, Mary L. Secretary	1-9 75	
Conway, Eleanor Shano Announcer	4-16-75	
Mays, LaVita Clerk-Typist	2-24-75	

7. State the number of female employees from the job applications listed above that were hired by you and the category or classification into which each female was placed upon employment.

ANSWER: Information submitted in response to Interrogatory Number 7 relates only to Westinghouse Broadcasting Company, KDKA Radio, One Gateway Center, Pittsburgh, Pennsylvania, 15222. Defendant objects to that part of Interrogatory Number 7 which relates to radio stations other than Westinghouse Broadcasting Company, KDKA, Pittsburgh, Pennsylvania, as being not relevant to the subject matter of the action and as imposing an unduly burdensome and oppressive task upon the Defendant because the information necessary to answer this Interrogatory for radio stations other than Westinghouse Broadcasting Company, KDKA, Pittsburgh, Pennsylvania, is not available to the representative of the Defendant providing Answers to this Interrogatory.

Prior to January 1, 1972, there was no division between radio and

TV personnel, and it is impossible to determine for which facility any person was hired prior to that date. Westinghouse Broadcasting Company, KDKA Radio, hired twenty-eight (28) females from January 1, 1972 to the present. Information as to the females hired is as follows:

NAME POSITION	DATE HIRED	LAST KNOWN ADDRESS
Bucci, Evelyn Sales Person	11-20-72	1721 Royal Oak Road #2C Pittsburgh, Pennsylvania 15220
Brodt, Judy Off. & Clerical	4-10-72	237 Universal Road Pittsburgh, Pennsylvania 15235
Johnson, Sardina Production Asst.	11-20-72	390 19 N. Lane #12 Pittsburgh, Pennsylvania 15237
Rose, Leslie Tele. Operator & Recep.	4-21-72	510 Dornestic Pittsburgh, Pennsylvania 15214

Sanders, Deloria Traffic Correlator	9-5-72	160 Bonifay Street Pittsburgh, Pennsylvania 15210
Talotta, Janice Secretary	5-11-72	237 Marshall Avenue Carnegie, Pennsylvania 15106
Totaro, Lorraine Secretary	8-21-72	1456 Woodline Street Pittsburgh, Pennsylvania 15201
Busic, Maureen Traffic Correlator	5-29-73	RD #1 Box 295 McDonald, Pennsylvania 15057
Lorenzini, Sandra Traffic Correlator	2-5-73	3232 Pinchurst Avenue Pittsburgh, Pennsylvania 15216

Lynch, Anna Technician	6-4-73	827 Berkshire Avenue Pittsburgh, Pennsylvania 15226
Preston, Carol Staff Anouncer	6-25-73	405 South Braddock Avenue Pittsburgh, Pennsylvania 15221
McCloskey, Barbara Traffic Clerk	3-20-73	9237 Valley Street Pittsburgh, Pennsylvania 15235
Scott, Elizabeth Adm. Personnel Coordinator	1-1-73	715 Chess Monongahela, Pennsylvania 15063
Steigleder, Germaine Detail Acctg. Clerk	9-19-73	2 Hidden Valley Drive Finleyville, Pennsylvania 15332

Thomas, Anne Secretary	5-14-73	5851 Morrowfield Avenue Pittsburgh, Pennsylvania 15217
Welsh, Denise Clerk-Typist	8-20-73	320 Cliffside Manor #41 Pittsburgh, Pennsylvania 15202
Cleeland, Pamela Adv. & Sls. Promo. Mgr.	10-28-74	944 Vista Glen Drive Bethel Park, Pennsylvania 15102
Elder, Lois Traffic Correlator	2-4-74	2208 Chalfant Street Pittsburgh, Pennsylvania 15221
Groover, Charlotte Traffic Clerk	10-21-74	152 Oakville Drive Pittsburgh, Pennsylvania 15220

Gunselman, Mary Traffic Clerk	4-1-74	4319 Tesla Street #2 Pittsburgh, Pennsylvania 15217
Hrubic, Janet Producer	2-18-74	119 Oakville Drive #2A Pittsburgh, Pennsylvania 15220
Lee, Ida Secretary	8-12-74	59 Penn Circle W. #U210 Pittsburgh, Pennsylvania 15206
May, Bonnie Salesman	10-15-74	839 Herberton Street Pittsburgh, Pennsylvania 15206
Tumbas, Helen Tele. Oper. & Recep.	9-8-74	4143 Brownsville Road Pittsburgh, Pennsylvania 15227

Bigelow Hotel #523 Bigelow Boulevard Pittsburgh, Pennsylvania 15219		
1139 Greenridge Lane Pittsburgh, Pennsylvania 15220		
5859 Northumberland Pittsburgh, Pennsylvania 15219		
3025 Centre Avenue Pittsburgh, Pennsylvania 15219		
Castillo, Mary L. Sec./Steno	1-9-75	
Conway, Eleanor Staff Announcer	4-14-75	
Grano, Cynthia Staff Anouncer	5-19-75	
Mays, LaVita Clerk-Typist	3-18-75	

8. State the number of female employees who were discharged by you from January 1, 1970 until the present time.

ANSWER: Information submitted in response to Interrogatory Number 8 relates only to Westinghouse Broadcasting Company, KDKA Radio, One Gateway Center, Pittsburgh, Pennsylvania, 15222. Defendant objects to that part of Interrogatory Number 8 which relates to radio stations other than Westinghouse Broadcasting Company, KDKA, Pittsburgh, Pennsylvania, as being not relevant to the subject matter of the action and as imposing an unduly burdensome and oppressive task upon the Defendant because the information necessary to answer this Interrogatory for radio stations other than Westinghouse Broadcasting Company, KDKA, Pittsburgh, Pennsylvania, is not available to the representative of the Defendant providing Answers to this Interrogatory.

There is no information available for employees discharged prior to January 1, 1972. The available records

of Westinghouse Broadcasting Company, Inc., KDKA Radio, Pittsburgh, Pennsylvania, indicate that six (6) female employees were discharged during the period from January 1, 1972, to present. Those female employees discharged are:

NAME POSITION	DATE RELEASED	LAST KNOWN ADDRESS
Brucci, Evelyn Account Executive	8-28-74	1721 Royal Oak Road #2C Pittsburgh, Pennsylvania 15220
Christian, LaVorda Secretary	3-13-72	322 N. Fairmont Street Pittsburgh, Pennsylvania 15206
Eich, Carol Detail Acctg. Clerk	9-27-74	4116 Penn Avenue Pittsburgh, Pennsylvania 15224
Evans, LaVerne Tele. Oper, & Recep.	9-15-74	1007 Emery Drive Pittsburgh, Pennsylvania 15227

Rose, Leslie	11-27-72	510 Dornestic Street Pittsburgh, Pennsylvania 15214
Tele. Oper, & Recep.		
Wermuth, Lucinda	8-2-72	514 S. Graham Street Pittsburgh, Pennsylvania 15232
Traffic Correlator		

FREELAND & KRONZ

BY s/Wendell G. Freeland
WENDELL G. FREELAND

BY s/Richard F. Kronz
RICHARD F. KRONZ, Esq.

A F F I D A V I T

COMMONWEALTH OF PENNSYLVANIA :
: SS:
COUNTY OF ALLEGHENY :

BEFORE ME, the undersigned authority personally appeared EDWARD WALLIS, Director of Westinghouse Broadcasting Company and Regional Vice President in charge of Westinghouse Broadcasting Company, KDKA Radio, Pittsburgh, Pennsylvania, who being duly sworn, deposes and says that the Answers to Interrogatories submitted herewith, are to the best of his knowledge and belief, true and correct.

Deponent further asserts that he is an officer of Westinghouse Broadcasting Company and is authorized to make this Affidavit on behalf of the Defendant.

/s/Edward Wallis
EDWARD WALLIS

JURAT
[Jurat omitted in printing]

[Title omitted in printing]

INTERROGATORIES TO PLAINTIFF

1. On or about September 16, 1974, did you convey certain demands to the Equal Employment Opportunity Commission regarding the proposed conciliation agreement in the case which you filed against KDKA Radio at EEOC Case No. YP13-208?

ANSWER: Yes, there was a written proposal to conciliate the Complaint.

2. If the answer to question 1 is in the affirmative, was one of these demands to the effect that you be auditioned by a panel of judges including members of the Association for Women in Radio and Television, and that if there was only one woman representative of this Association on the panel, that this woman must be white?

ANSWER: No, no such demand is in this proposal.

3. If the answer to question number 1 is in the affirmative, did you also make a demand to the effect that if you were found unqualified, that a

special training program be instituted for you specifically and for women generally?

ANSWER: No; no such demand is in the proposal.

4. Is your primary motivation in bringing this lawsuit to secure employment for yourself?

ANSWER: Yes.

5. Were you notified by the Commission on Human Relations of the City of Pittsburgh or the Equal Employment Opportunity Commission that the Equal Employment Opportunity Commission had deferred the claim on which this suit is based to the City Commission?

ANSWER: I was informed on July 19, 1972 that the EEOC had referred the charge TPI2-0823 to the Pennsylvania Human Relations Commission.

6. Did you notify or inform the Commission on Human Relations of the City of Pittsburgh to the effect that you did not wish to sign a Complaint or authorize it to investigate the claim deferred to it by the Equal Employment

Opportunity Commission on which this suit is based?

ANSWER: I requested the Pittsburgh Human Relations Commission to refer the Complaint back to the EEOC and this was done. Mr. Gabriel did so on July 18, 1972.

7. What is the state or local government agency with which you filed the charge on which this suit is based, as set forth in Item 4 of Exhibit "A" of the Complaint?

ANSWER: I requested the Pittsburgh Human Relations Commission to consider my Complaint a formal Complaint on April 7, 1972, which was acknowledged on April 13, 1972.

8. For each position of employment you have held since the age of 18, list the name of your employer, the nature of the employment, the position or positions held, the date or dates of employment, your salary and the reason or reasons for termination.

ANSWER: Up till the time of the alledged discriminatory act, my employment was:

Dates	Salary	Expenses	Nature of Work	Employer	Position	Reason for Leaving
1969-1972			Speaker Writer Organizer	Self Employed	Board of Directors NOW, Inc.	Not applicable
1968-1970	~$12,000 a year		Research in learning & mathematics	Univ. of Pgh.	Center Associate	Activity in feminism
1967-1968	~$12,000 a year		Teaching	Calif. State College	Assoc. Prof.	Excessive travel

Carnegie Mellon Univ.	Teaching & research	Visiting Ass't. Prof.	1965-1967	~$12,000 a year	Time limited contract
Univ. of Pgh.	Teaching	Lecturer	1957-1964	~$5,000 a year	Graduated
Univ. of Pgh.	Research	Assistant	1955-1956	~$3,000 a year	Entered graduate study
Cornell Univ.	Research	Assistant	1954-1955	~$3,000 a year	Moved to Pittsburgh

Mellon Inst.	Research	Assistant	1950-1951	$2,000 a year	Moved to Dublin
Mellon Inst.	Miscellaneous	Technician	1945-1950	$2,000 a year	Better job
U. S. Army	Driving	Driver	1943-1944	$2,000 a year	Moved to Pittsburgh

TEMPORARY JOBS:

Chatham College	Instructor of Experimental Lab	1964	Temporary Job
Penn State Univ. McKeesport Campus	Visiting Assistant Professor	1965	Temporary Job
Mellon Inst.	Miscellaneous Waiter Cashier	1945-	Temporary Job

9. List each institution of higher education beyond the high school level you have attended, the degrees awarded, major fields of study and dates of attendance:

ANSWER:

Institution	Degree	Field	Dates
University of Pgh.	Ph.D.	Psychology	1964
University of Pgh.	M.S.	Psychology	1960
University of Pgh.	B.A.	Biology-Chemistry	1950

10. Did you originally contact KDKA Radio for the sole purpose of applying for employment?

ANSWER: Yes.

11. What caused you to apply for the position in question at KDKA Radio?

ANSWER: I learned that a talk show host position was to be filled by reading a TV news column in the Post Gazette.

12. Why did you want this position of employment?

ANSWER: I did not have a salaried position at that time and thought that

this would be an opportunity to enter a field in which I seem to have a natural talent.

13. Whom did you contact to request the interview referred to in Item 7 of Exhibit "A" of the Complaint?

ANSWER: I contacted Mr. Charles Peterson, an employee of Westinghouse Broadcasting, and made an appointment for a meeting.

14. What date did you make the request for an interview?

ANSWER: I arranged a meeting with Mr. Peterson for January 19, 1972 or thereabout.

15. How did you contact the person referred to in question number 13?

ANSWER: I telephone Mr. Peterson.

16. With regard to the column referred to in Item 7 in Exhibit "A" of the Complaint, state the name of the newspaper in which the column appeared, the date on which the column appeared in this newspaper, the nature of the column, the page on which the column appeared and the name of the author of the column.

ANSWER: The article appeared in the Post Gazette on January 7, 1972, in a column called "On The Air", which generally reports news about TV and radio, on an unknown page. The column was written by Mr. Winn Fanning.

17. On what date were you given the interview referred to in Item 7 of Exhibit "A" of the Complaint?

ANSWER: I met with Mr. Peterson on January 19, 1972, or thereabout.

18. What time did the interview referred to in question number 17 take place?

ANSWER: I believe the meeting occurred after lunch.

19. Who conducted the interview referred to in question number 17?

ANSWER: I met only with Mr. Peterson.

20. Where did the interview referred to in question number 17 take place?

ANSWER: The meeting took place in an office in Gateway Center.

21. Who notified you that the reporter's job had been filled?

ANSWER: No one informed me that the Reporter's job had been filled.

22. What date were you notified that the reporter's job had been filled?

ANSWER: I was never informed that the Reporter's job had been filled.

23. How were you notified that the reporter's job had been filled?

ANSWER: Not applicable.

24. What reason, if any, were you given for not being hired by KDKA Radio for the position for which you applied?

ANSWER: I was never considered for the job for which I had applied, that of talk show host. During the interview, Mr. Peterson said I was too biased and controversial to be hired even if I were being considered for the job.

25. What do you consider as your qualifications for an on-the-air position at KDKA Radio?

ANSWER: Among my qualifications I would list the following:

1. I am articulate, well educated, quick witted, well spoken and experienced in public speaking.

2. I am knowledgeable in the field of Psychology and interact well with people. I enjoy conversation.

3. I have a clear pleasant voice which is lively, interesting and transmits well by radio communications.

4. Compared with the men who are talk show hosts, I would offer a new and different personality attractive to another wide audience and this would help Westinghouse Broadcasting capture more listeners, increase its ratings and hence its revenues.

25.[sic] I had a third class radio operator's license from the Federal Communications Commission.

26. With the exception of the application which forms the basis of this action, have you ever applied for employment at any radio or television stations?

ANSWER: No

27. If the answer to the last question is in the affirmative, list the name and location of each station, the position for which application was made and the result of the application. If

any of these applications resulted in denials of employment, list the reasons, if any, you were given for such denials.

ANSWER: Not Applicable.

28. Have you ever received monetary compensation for appearing on any radio or television program?

ANSWER: Yes. I have received expenses and fees once on the Public Broadcasting System.

29. If the answer to the last question is in the affirmative, list the name and location of the station, whether it was a radio or television broadcast, the date of the broadcast, the time of the broadcast, the name of the program, the type of program, your role in the program and the amount of compensation you received.

ANSWER: Prior to 1972, I recall being on the following programs:

Station	Place	Medium	Date	Time	Name	Type	Role	Comp.
CBS Affil-iate	Los Angeles	TV	1970	Network	Art Link-Letter	Talk Show	Guest	Exp.
NBC	Miami	TV	1972	Network	Today Show	News	Guest	Exp.
NBC	Wash. D.C.	TV	1972	Syndi-cated	Barbara Walters	Conver-sation	Guest	Exp.
NBC	New York City	TV	1971	Network	David Suss-kind	Talk Show	Guest	Exp.

Name	Type	Role	Comp.
Ed Newman	Documentary	Expert	Exp.
Woman	Talk Show	Expert + $300	Exp.

Station	Place	Medium	Date	Time
NBC	New York City	TV	1971	
PBS	Buffalo, New York	TV	1977?	Eve. (various)

30. For each Complaint you have ever filed with the United States Equal Employment Opportunity Commission, list the respondent(s), the case and charge numbers, the office where the Complaint was filed, the nature and substance of the Complaint and the disposition of the case.

ANSWER: To my knowledge, I have filed the following Complaints with the EEOC:

1. Respondent - Philadelphia Housing Authority, Charge No. TPA2-1492, Philadelphia office. I filed this as a representative of the National Organization for Women. This was a charge of sex discrimination in the area of illegal job advertising. The EEOC mislaid the records.

2. Respondent - Cosmopolitan Employment Agency, Charge No. YPI5-154, Pittsburgh office. I filed this as a representative of the National Organization for Women. This was a charge of sex discrimination in the area of illegal job advertising. The EEOC found in

favor of the charging party; the case was conciliated.

3. The present case against Westinghouse Broadcasting.

4. Respondent--Equal Employment Opportunity Commission, charge is processed through the Civil Service Commission. This is a charge of sex discrimination in hiring. A decision adverse to the charging party is presently before the Appeal and Review Board.

31. For each Complaint you have ever filed with the Pennsylvania Human Relations Commission, list the respondent(s), the case or docket number, the office where the Complaint was filed, the nature and substance of the Complaint and the disposition of the case.

ANSWER: None. The present case was deferred to the Pennsylvania Human Relations Commission.

32. For each Complaint you have ever filed with the Commission on Human Relations of the City of Pittsburgh, list the respondent(s), the case number, the nature and substance of the Complaint and the disposition of the case.

ANSWER: This case is the only one.

33. For each Complaint, Charge or Challenge you have ever filed with the Federal Communications Commission, list the respondent or station, the Commission docket number, the nature and substance of the Complaint, Charge, or Challenge and the disposition of the case.

ANSWER: None.

34. For each Complaint, Charge or Claim you have ever filed with any other administrative agency or commission of any government or jurisdiction, list the agency or commission, the respondent(s), the case or docket number, the nature and substance of the Complaint, Charge or Claim and disposition of the case.

ANSWER: Spring 1970 -- I was one of the members of the University Committee for Womens Rights who complained of sex discrimination practiced by the University of Pittsburgh, in a formal complaint to the Department of Health, Education and Welfare.

35. Do you presently contemplate filing any Complaints, Charges, Challenges or Claims with any of the agencies or commissions referred to in questions 30-34 above?

ANSWER: This is highly speculative and the question is objected to on the grounds that it is irrelevant.

36. If the answer to question number 35 is in the affirmative, list for each such action contemplated the name of the agency or commission, the respondent(s), and the nature and substance of the contemplated Complaint, Charge, Challenge or Claim.

ANSWER: Not Applicable.

37. With the exception of this case, have you ever been a party to an action in Court?

ANSWER: The question is objected to on the grounds that it is irrelevant.

38. If the answer to the last question is in the affirmative, list for each case the title of the case, the Court and jurisdiction, the docket number, the relief sought, the nature and substance of the action and the disposition of the case.

ANSWER: Not Applicable.

39. Do you presently contemplate instituting any actions in Court?

ANSWER: This is highly speculative, and the question is objected to on the grounds that it is irrelevant.

40. If the answer to the last question is in the affirmative, list for each such action contemplated, the Court and jurisdiction, the defendant(s), the relief sought and the nature and substance of the case.

ANSWER: Not Applicable.

41. Have you ever been a candidate for election to public office?

ANSWER: Yes

42. If the answer to the last question is in the affirmative, list, for each time you were a candidate, the office for which you were a candidate, the date of the primary and general elections in which your name appeared as a candidate, the names of any organizations, newspapers, and political parties that endorsed or supported your candidacy, the result of the primary and general elections as regards your candidacy, and, if elected to office, the length of the term for which you held that office.

ANSWER:

1971 -- I ran for the Pittsburgh City Council in the primary and general elections. I was endorsed by the Pittsburgh Post Gazette, the Pittsburgh Forum, the Americans for Democratic Action, and the National Women's Political Caucus. I won the primary, but lost the general election.

1972 -- I ran for the Pittsburgh Home Rule Commission in the general election. I lost the general election.

1972 -- I ran for the Allegheny County Home Rule Commission in the general election. I won the general election, and served an eighteen (18) month term.

43. Are you now, or were you at the time of making the application for employment in question, a member of any organization or political party referred to in 42 U.S.C. §2000e-2(f)?

ANSWER: Not to my knowledge.

44. With reference to Paragraph V A(1) of the Complaint in this action, why do you believe you are an adequate representative of "female persons who

are now employed, have been employed from July 2, 1965 to the present, or might be employed by the Defendant as professionals, officials, and managers on its broadcasting staff or as technicians, sales workers, or otherwise?" (In answering this question and all of the following questions regarding the allegations in Paragraph V and Paragraph II of the Complaint, including everything which you propose to prove or introduce in Court in any proceedings pursuant to F.R.C.P. 23 (c) and at trial in the event that the Court certifies this case as a class action.)

ANSWER: I am a victim of sex discrimination as a result of the policies and practices of Westinghouse Broadcasting; others have suffered similar discriminatory acts because they are women as the Defendant discriminates against all women in the manner alleged in the complaint and I believe I can represent them as I am a women who has been discriminated against.

45. In what specific ways do you believe that the Defendant has engaged

in unlawful employment practices with regard to the class of persons included in Paragraph V A(1) of the Complaint?

ANSWER: Westinghouse Broadcasting has not maintained a parity between men and women in salary, promotion, assignment, training, ~~and~~ [sic] conditions of employment and hiring.

46. Do you know of any specific instances of unlawful employment practices by the Defendant toward members of the class defined in Paragraph V A(1) of the Complaint other than those allegedly practiced against yourself?

ANSWER: I am aware of several cases of discrimination that have been filed by individuals in which Westinghouse Broadcasting was named as a respondent.

47. If the answer to the last question is in the affirmative, list for each such instance the name and address of the member of the class involved, the time that the unlawful act is alleged to have taken place, and the specifics of the charge of unlawful employment practices.

ANSWER: Since the above information may be confidential under Title VII, indentification of these individuals may violate Title VII.

48. What is your estimate of the number of persons who are members of the class defined in Paragraph V A(1) of the Complaint?

ANSWER: I am unable to so estimate from my own knowledge, but my lawyer will be able to do so after discovery procedures are completed.

49. What are the common questions of fact and law affecting the rights of members of the class defined in Paragraph V A(1) of the Complaint?

ANSWER: The common questions of fact and law are, to my knowledge, that women have been discriminated against in salary, job promotion, job assignments, training and terms and conditions of employment and hiring. Any further answer is best obtainable from my attorney.

50. With reference to Paragraph V A(2) of the Complaint, why do you believe that you are an adequate representative

of "those females who have unsuccessfully applied for employment from the Defendant?"

ANSWER: See answer to question 44.

51. In what specific ways do you believe that the Defendant has engaged in unlawful employment practices with regard to the class of person [sic] included in Paragraph V A(2) of the Complaint?

ANSWER: Westinghouse Broadcasting has refused to employ women in certain jobs, particularly in administration and other higher paying jobs.

52. Do you know of any specific instances of unlawful employment practices by the Defendant toward members of the class defined in Paragraph V A(2) of the Complaint?

ANSWER: See answer to question 46.

53. If the answer to the last question is in the affirmative, list for each such instance the name and address of the member of the class involved, the time that the unlawful act is alleged to have taken place, and the specifics of

the charge of unlawful employment practices.

ANSWER: See answer to question 47.

54. What is your estimate of the number of persons who are members of the class defined in Paragraph V A(2) of the Complaint?

ANSWER: See answer to question 48.

55. What are the common questions of fact and law affecting the rights of members of the class defined in Paragraph V A(2) of the Complaint?

ANSWER: The common questions of fact and law are, to my knowledge, that women have not been considered for certain jobs because of their sex and that women as a class are not considered for promotion and certain job assignments e.g., I have never heard a female "disc jockey" on KDKA or any other Westinghouse radio station. Any further answer is best obtainable from my attorney.

56. With reference to Paragraph V A(3) of the Complaint, why do you believe that you are an adequate representative

of "those females who have been discharged by the Defendant?"

ANSWER: See answer to question 44.

57. In what specific ways do you believe that the Defendant has engaged in unlawful employment practices with regard to the class of persons included in Paragraph V A(3) of the Complaint?

ANSWER: Westinghouse Broadcasting has discharged persons because of sex discrimination, I believe.

58. Do you know of any specific instances of unlawful employment practices by the Defendant toward members of the class defined in Paragraph V A(3) of the Complaint?

ANSWER: See answer to question 46.

59. If the answer to the last question is in the affirmative, list for each such instance the name and address of the member of the class involved, the time that the unlawful act is alleged to have taken place, and the specifics of the charge of unlawful employment practice.

ANSWER: See answer to question 47.

60. What is your estimate of the number of persons who are members of the class defined in Paragraph V A(3) of the Complaint?

ANSWER: See answer to question 48.

61. What are the common questions of fact and law affecting the rights of members of the class defined in Paragraph V A(3) of the Complaint?

ANSWER: The common questions of fact and law are, to my knowledge, that women have been discharged because of sex discrimination. Any further answer is best obtainable from my attorney.

62. With reference to Paragraph V A(4) of the Complaint, why do you believe that you are an adequate representative of "those females who would have applied for employment but for the reputation of Defendant in the community that Defendant denied equal employment opportunity to females?

ANSWER: See answer to question 44.

63. In what specific ways do you believe that the Defendant has engaged in unlawful employment practices with regard to the class of persons included in Paragraph V A(4) of the Complaint?

ANSWER: Westinghouse Broadcasting Company's attitude toward women applicants and employees and lack of females on its staff has contributed to its reputation of not affording women equal opportunity.

64. Do you know of any specific instances of unlawful employment practices by the Defendant toward members of the class defined in Paragraph V A(4) of the Complaint?

ANSWER: See answer to question 46.

65. If the answer to the last question is in the affirmative, list for each such instance the name and address of the member of the class involved, the time that the unlawful act is alleged to have taken place, and the specifics of the charge of unlawful employment practices.

ANSWER: See answer to question 47.

66. What is your estimate of the number of persons who are members of the class defined in Paragraph V A(4) of the Complaint?

ANSWER: See answer to question 48.

67. What are the common questions of fact and law affecting the rights of members of the class defined in Paragraph V A(4) of the Complaint?

ANSWER: The common questions of fact and law are, to my knowledge, that Westinghouse Broadcasting has created the feeling and image that it discriminates against women. Westinghouse Broadcasting has presented a narrowed image of women which has devaluated [sic] women, which discourages women from seeking employment in broadcasting.

68. With reference to Paragraph V A(5) of the Complaint, why do you believe that you are an adequate representative of "those females who will apply and will not be considered for certain jobs because of their sex?"

ANSWER: See answer to question 44.

69. In what specific ways do you believe that the Defendant has engaged in unlawful employment practices with regard to the class of persons included in Paragraph V A(5) of the Complaint?

ANSWER: If Westinghouse Broadcasting continues in its present posture, other women applicants will suffer sex discrimination in hiring and job assignments.

70. Do you know of any specific instances of unlawful employment practices by the Defendant toward members of the class defined in Paragraph V A(5) of the Complaint?

ANSWER: See answer to question 46.

71. If the answer to the last question is in the affirmative, list for each such instance the name and address of the member of the class involved, the time that the unlawful act is alleged to have taken place, and the specifics of the charge of unlawful employment practices.

ANSWER: See answer to question 47.

72. What is your estimate of the number of persons who are members of the

class defined in Paragraph V A(5) of the Complaint?

ANSWER: See answer to question 48.

73. What are the common questions of fact and law affecting the rights of members of the class defined in Paragraph V A(5) of the Complaint?

ANSWER: The common questions of fact and law are, to my knowledge, that Westinghouse Broadcasting, through its policies and practices, has practiced sex discrimination against job applicants. Any further answer is best obtainable from my attorney.

74. With reference to Paragraph V B of the Complaint, in which specific ways has "the Defendant. . .maintained a pattern and practice in hiring resulting in Plaintiff and other members of the same class having been denied consideration for jobs. . ."?

ANSWER: Westinghouse Broadcasting refused to train, interview and consider in the normal channels women who are qualified for certain jobs, particularly higher salaried jobs e.g., there are no

women as "disc jockeys", "anchor news people" or as "sole talk show persons" to my knowledge on Westinghouse radio stations.

75. With regard to the last question, are you aware of any specific instances where unlawful practices of the Defendant have resulted in such denials?

ANSWER: See answer to question 46.

76. If the answer to the last question is in the affirmative, list for each such instance the name and address of the member of the class, the time that the unlawful act is alleged to have taken place and the specifics of the charge of unlawful employment practice.

ANSWER: See answer to question 47.

77. With reference to Paragraph V B of the Complaint, in what specific ways has "the Defendant. . .maintained a pattern and practice in hiring resulting in Plaintiff and other members of the same class having been. . .refused opportunities for jobs. . .?"

ANSWER: See answer to question 74.

78. With regard to the last question, are you aware of any special instances where unlawful practices of the Defendant have resulted in such refusals?

ANSWER: See answer to question 46.

79. If the answer to the last question is in the affirmative, list for each such instance the name and address of the member of the class, the time that the unlawful act is alleged to have taken place and the specifics of the charge of unlawful employment practices.

ANSWER: See answer to question 47.

80. With reference to Paragraph V B of the Complaint, in what specific ways has "the Defendant. . .maintained a pattern and practice in hiring resulting in Plaintiff and other members of the same class having been. . .denied opportunities for promotions for jobs. . .?"

ANSWER: See answer to question 74.

81. With regard to the last question, are you aware of any specific instances where unlawful practices of the Defendant have resulted in such denials?

ANSWER: See answer to question 46.

82. If the answer to the last question is in the affirmative, list for each such instance the name and address of the member of the class, the time that the unlawful act is alleged to have taken place and the specifics of the charge of unlawful employment practices.

ANSWER: See answer to question 47.

83. With reference to Paragraph V B of the Complaint, in what specific ways has "the defendant. . .maintained a pattern and practice in hiring resulting in Plaintiff and other members of the same class. . .not being provided equal opportunities?"

ANSWER: See answer to question 45.

84. With regard to the last question, are you aware of any specific instances where unlawful practices of the Defendant have resulted in such denials or refusals of equal opportunities?

ANSWER: See answer to question 46.

85. If the answer to the last question is in the affirmative, list for each such instance the name and address of the member of the class, the time that the unlawful act is alleged to have taken place and the specifics of the charge of unlawful employment practices.

ANSWER: See answer to question 47.

86. What are the specific facts which form the basis for your assertions in Paragraph V A(4) that Defendant has a reputation in the community for denying equal employment opportunity to females and in Paragraph V B(3) of the Complaint that "the defendant has maintained a posture of denying equal opportunity to women which is well known in the community, thus discouraging women from seeking employment?"

ANSWER: See answer to question 63.

87. What the [sic] the specific facts which form the basis for your assertion in Paragraph V D(3) of the Complaint that "all aspects of the employment practices of the defendant are permeated with sex discrimination. . .?"

ANSWER: See answer to question 45.

88. With reference to Paragraph II of the Complaint, in what specific ways do you maintain that the Defendant has discriminated against you and other members of the class with respect to hiring and job classifications?

ANSWER: See answer to question 45. Additionally, Westinghouse Broadcasting refused to consider me for the job for which I applied.

89. With regard to the last question, are you aware of any specific cases of such discrimination?

ANSWER: See answer to question 46.

90. If the answer to the last question is in the affirmative, list the

name and address of any person so discriminated against, the time that the discrimination is supposed to have taken place and the specifics of each case of such discrimination.

ANSWER: See Answer to question 47.

91. With reference to Paragraph II of the Complaint, in what specific ways do you maintain that the Defendant has discriminated against you and other members of the class with respect to compensation terms?

ANSWER: Because Westinghouse Broadcasting Co. has refused to consider women for jobs in the broadcasting staff and management, there is discrimination in compensation. See answer to question 74.

92. With regard to the last question, are you aware of any specific cases of such discrimination?

ANSWER: See answer to question 46.

93. If the answer to the last question is in the affirmative, list the name and address of any person so

discriminated against, the time that the discrimination is supposed to have taken place and the specifics of each case of such discrimination.

ANSWER: See answer to question 47.

94. With reference to Paragraph II of the Complaint, in what specific ways do you maintain that Defendant has discriminated against you and other members of the class with respect to conditions and privileges of employment?

ANSWER: Westinghouse Broadcasting failed to provide maternity benefits, an employment atmosphere free of sexism, failed to equalize the participation of men and women in broadcasting, failed to provide access of the airways to women.

95. With regard to the last question, are you aware of any specific cases of such discrimination?

ANSWER: See answer to question 46.

96. If the answer to the last question is in the affimative, list the name and address of any person so discriminated against, the time that the

discrimination is supposed to have taken place and the specifics of each case of such discrimination.

ANSWER: See answer to question 47.

97. With reference to Paragraph II of the Complaint, in what specific ways do you maintain that Defendant has limited and classified its employees in a manner that deprives you and other members of the class of equal status as employees because of sex?

ANSWER: See answer to question 45.

98. With regard to the last question, are you aware of any specific cases of such limitations and/or classifications?

ANSWER: See answer to question 46.

99. If your answer to the last question is in the affirmative, list the name and address of any person so limited or so classified, the time that such limitation or classification is supposed to have been made and the specifics of

each case of such limitation and/or classification.

ANSWER: See answer to question 47.

s/Wendell G. Freeland
Wendell G. Freeland
Attorney for Defendant

s/Robert N. Hackett
Robert N. Hackett
Attorney for Plaintiff

AFFIDAVIT

Before me, the undersigned authority, personally appeared JO ANN EVANS GARDNER, who being duly sworn according to law, deposes and says that the foregoing answers are true and correct to the best of her knowledge, information and belief.

s/Jo Ann Evans Gardner

JURAT
[Jurat omitted in printing]

[Title omitted in printing]

NOTICE

TO: Wendell G. Freeland, Esquire
Richard F. Kronz, Esquire
409 Plaza Building
Pittsburgh, Pa. 15219

Take notice that the within Motion to Compel Discovery has been filed this date and will be considered at the discretion of the Court.

BASKIN, BOREMAN, WILNER
SACHS, GONDELMAN & CRAIG

By /s/Robert N. Hackett
Robert N. Hackett, Esquire

/s/Joan P. Feldman
Joan P. Feldman, Esquire

Attorneys for Plaintiff

[Title omitted in printing]

MOTION TO COMPEL DISCOVERY

AND NOW comes the Plaintiff pursuant to Rule 37 of the Federal Rules of Civil Procedure, as amended, and requests this Honorable Court to compel discovery against the Defendant. In support thereof Plaintiff sets forth the following:

1. This is a suit in equity authorized and instituted pursuant to Title VII of the Act of Congress known as "The Civil Rights Act of 1964", 42 USC §2000(e) et seq.

2. On July 9, 1975, Plaintiff served Interrogatories on the Defendant. A copy of said Interrogatories is attached hereto as Exhibit "A" and incorporated herein.

3. On August 26, 1975, Defendant submitted its Answers to Plaintiff's Interrogatories, in which it refused to make any responses concerning radio stations other than Station KDKA in Pittsburgh. Defendant refused to make a

complete response to questions 3, 4, 5, 6, 7 and 8.

4. Defendant refused to answer the aforesaid Interrogatories, using the objection that the requests were not relevant and were burdensome. This a nationwide class action, sanctioned by case law, and in order to determine whether such a class exists, statistics as to the employment practices in the other stations operated by Westinghouse Broadcasting are both necessary and relevant.

5. Plaintiff believes that all the aforesaid Interrogatories are properly within the scope of discovery under the Federal Rules of Civil Procedure.

WHEREFORE, Plaintiff respectfully requests this Honorable Court to enter an Order compelling the Defendant to answer the said Interrogatories and supply statistics on the employment of females in the other stations operated by it, and further to award the

Plaintiff's counsel costs and attorney's fees for the taking of this Motion.

BASKIN, BOREMAN, WILNER
SACHS, GONDELMAN & CRAIG

By /s/Robert N. Hackett
Robert N. Hackett, Esquire

/s/Joan P. Feldman
Joan P. Feldman, Esquire

Attorneys for Plaintiff

[Title omitted in printing]

MOTION TO COMPEL DISCOVERY CERTIFICATE

Counsel for the Plaintiff hereby certifies in accordance with Local Rule 4a(2) that he has conferred and consulted with respect to Defendant's opposition to Plaintiff's Interrogatories. The conference took place on October 30, 1975.

s/Robert N. Hackett
Robert N. Hackett, Esquire

s/Joan P. Feldman
Joan P. Feldman, Esquire

Attorneys for Plaintiff

[Title omitted in printing]

INTERROGATORIES TO DEFENDANT WESTINGHOUSE BROADCASTING COMPANY IN ORDER TO DETERMINE A CLASS ACTION

AND NOW COMES the representative plaintiff pursuant to the Federal Rules of Civil Procedure, Rule 33, and submits her first interrogatories to be answered by defendant, Westinghouse Broadcasting Company.

I. Introduction

A. In these interrogatories:

1. The word "person(s)" means all entities and without limiting the generality of the foregoing includes natural persons, joint owners, associations, companies, partnerships, joint ventures, corporations, trusts, and estates.

2. The word "document(s)" means all written, printed, recorded or graphic matter, photographic matter of [sic] sound reproductions, however produced or reproduced, pertaining in

any manner to the subject matter indicated;

3. The words "identify", "identity", and "identification", when used with respect to a person or persons, means to state the full name anxpresent [sic] or last known residence and business address of such person or persons, and, if a natural person, his present or last known job title, and the name and address of his present or last known employer;

4. The words "identify", Identity", and "identification", when used with respect to a document or documents, means to describe the document or documents by date, subject matter, name(s) or person(s) that wrote, signed, initialed, dictated or otherwise participated in the creation of same, the name(s) of the addressee or addressees (if any) and the name(s) and address(es) of each person or persons who have possession, custody, or control of said document or documents. If any such document was, but is no longer, in your possession, custody or control, or in

existence, state the date and manner of its disposition;

5. The words "You" and "Your" means the defendant broadcasting institution or corporation including all its radio stations answering these interrogatories, its merged or acquired predecessor, its present and former officers, agents and all other persons acting or purporting to act on behalf of it or its various stations or predecessors, including all past or present employees exercising discretion, making policy and making decisions with respect to any corporate policy concerning any persons.

B. If the space provided after each Interrogatory for your Answer is not sufficient, use additional sheets, numbered, for example, in the case of Interrogatory No. 1, 1-A, 1-B, 1-C, etc., after each such Interrogatory, and insert same in proper order in all copies filed and served.

C. Each of the following Interrogatories is intended to be a continuing Interrogatory and plaintiffs hereby demand that in the event at any

later date the defendants obtain any additional facts, or form any conclusions, opinions or contentions different from those set forth in their answers to such Interrogatories such Defendants shall amend their answers to such Interrogatories promptly, and sufficiently in advance of any trial, to fully set forth such differences.

D. Time Period.

All information requested is for the period from January 1, 1970 to date, by year unless otherwise specifically indicated. Each change within that period is to be given, with the date of such change.

1. State your Corporate name and proper corporate headquarters and the proper address of the corporate offices in Pittsburgh if different than the corporate headquarters.

ANSWER:

2. State the names of the various radio stations operated by you, the legal names and addresses of the

radio stations and the call letters of each radio station.

ANSWER:

3. State the organization of each radio station including the departments such as programing, personnel, accounting (billing), sales, advertising, executive, public service, payroll, producer-directors, engineering, etc., and any other departments which each radio station may have. Include under programing or other appropriate categories the organization of "on the air" persons including talk show hosts, news broadcasters, sports broadcasters, disc jockies, etc.

ANSWER:

4. State the number of female employees employed in the various departments of each radio station and identify the position and identify each female employee in the categories listed in question 3.

ANSWER:

5. If there are additional females employed by you not listed under question 4, identify each one and state the job or position held.

ANSWER:

6. State the number of female job applicants from January 1, 1970 until the present and identify each job applicant.

ANSWER:

7. State the number of female employees from the job applicants listed above that were hired by you and the category or classification into which each female was placed upon employment.

ANSWER:

8. State the number of female employees who were discharged by

you from January 1, 1970 until the present time.

ANSWER:

BASKIN, BOREMAN, WILNER
SACHS, GONDELMAN & CRAIG

By s/Robert N. Hackett
Robert N. Hackett, Esquire
Attorney for Plaintiff

CERTIFICATE OF SERVICE
[Certificate of Service omitted in printing]

CERTIFICATE OF SERVICE
[Certificate of Service omitted in printing]

Motion to Compel Discovery
(Proposed Order of Court)

[Title omitted in printing]

ORDER OF COURT

Upon hearing argument by counsel on Plaintiff's Motion that the Defendant be required to answer certain Interrogatories

IT IS ORDERED that the Defendant shall, on or before _____ 1975, serve its Answers to the Interrogatories, as enumerated in Plaintiff's Motion on file in this cause.

Dated:_____

_____
J.

Transcript of Proceedings

[Title omitted in printing]

TRANSCRIPT OF PROCEEDINGS

of Oral Argument held October 30, 1975, 3:00 o'clock p.m., United States District Court, Pittsburgh, Pennsylvania, before the Honorable Barron P. McCune, District Judge.

APPEARANCES:

On behalf of the Plaintiff:
Robert N. Hackett, Esquire
Joan P. Feldman, Attorney at Law

On behalf of the Defendant:
Wendell G. Freeland, Esquire

Margaret K. Mimless
Official Reporter.

(2)

THE COURT: Ladies and gentlemen, this is the time set for oral argument on the motion of the plaintiff to certify this litigation as a class action. We are ready to hear counsel for the plaintiff. Mr. Hackett.

MR. HACKETT: If the court please, I am going to give a brief argument on the posture of the case and Ms. Feldman will then argue on our brief which she has prepared.

We have filed this action as a class action under Rule 22 (b)(2). I think it is important in reading Rule 23 that it is noted that this is a civil rights case, because recent cases have been rather constrictive as to a (b)(3) case under Rule 23, that is, a case that is just looking for money damages.

However, all of the courts in the various circuits have been very liberal and very broad in urging a broad outlook and sweeping policy for civil rights class actions.

This has been most notable in the Third Circuit in the Wetzel case,

Wetzel vs Liberty Mutual, which Joan Feldman will discuss.

The posture of this case procedurally before this court is that in accordance with Rule 34, we filed a motion for this court to determine and certify this action as a class action.

The defendant chose not to respond to the motion by an answer, and the defendant did not file a brief.

(3)

Therefore, procedurally our first observation would be that the defendant should be deemed to have not opposed this motion.

We, in accordance with good federal practice, and I think as Professor Moore urges and Judge Silvestri in his article on class actions in Pennsylvania, are justified in filing interrogatories in order to determine if this was a class action. That is, the burden is on the plaintiff to show that it is a class action, and, of course, you must show numerosity and various other requirements of Rule 23 (a) in order to have it be a class action.

We asked for it to be a nationwide class action, nationwide only in the sense that it would cover all the radio stations owned by Westinghouse Broadcasting Company.

When we filed interrogatories, the defendant chose to only answer those questions concerning KDKA, that is, the local broadcasting station of Westinghouse Broadcasting Company.

We have prepared today and have served on the defendant a motion to compel answers to the questions concerning a class action as to the other five broadcasting stations, because unless those interrogatories are answered, we cannot say, as we can in KDKA, that there were 230 applicants. We can not say that there were 200 or 150 employees in these other stations. Therefore, we would urge

(4)

that in order to determine the existence of a class in the other areas, as far as the five other radio stations or six, I can't remember which, that the defendant be compelled to answer these interrogatories.

Therefore, the plaintiff has carried out its procedural requirements to the utmost. It filed promptly a motion to determine the class action.

The defendant did not answer the motion. The defendant did not file a brief in opposition to the granting of a class action, and the defendant chose not to answer the interrogatories which would really show, in fact, whether there is a nationwide class.

Now, I'm going to turn our legal argument on the cases over to Ms. Feldman and she will spend a few minutes with the legal cases, your Honor. Thank you.

MS. FELDMAN: Before I begin, your Honor, I would like to hand up to you a copy of the supplemental brief which we have prepared and an additional copy for your law clerk.

THE COURT: I think I already have that.

MS. FELDMAN: This is the second one, your Honor.

THE COURT: Second Supplemental?

MS. FELDMAN: Yes.

THE COURT: All right.

(5)

MS. FELDMAN: We are here today to demonstrate that according to the case law which has been developing since the passage of Title VII, we have manifestly met all of the requirements of Rule 23 in order to certify this as a class action as to the seven radio stations which are operated by defendant, Westinghouse Broadcasting Company.

The most important thing to remember at the outset is that it was perhaps envisioned by the drafters of Rule 23 that Rule 23 would be a vehicle particularly applicable to civil rights cases, and, indeed, this is also very clearly seen in the notes of the drafters to Rule 23 (b)(2). The policy of congress was clearly to eliminate all existing unlawful discriminatory practices, and in order to do so, in order best to do so, without a mutiplicity of suits, it was deemed and has been deemed by courts ever since the earliest cases involving this particular aspect of civil rights that one individual could challenge in an across the board action all of an

employer's unlawful practices, thus avoiding the possibility that many suits would have to be brought by the employees and applicants and discharged persons of the same employer.

To get into the particular elements of Rule 23, first of all, as you know, your Honor, we must first demonstrate that there are so many members of this potential class that joinder would be impracticable.

(6)

Interrogatories which we have served upon the defendant, we have been able to ascertain that as to radio station KDKA alone, there are 24 present female employees, 321 female applicants in 1975, of whom 28 were hired and six persons who have been discharged.

KDKA has informed us that they only keep records for three months, so this is only a small portion of the persons who would be able to be potential class members.

THE COURT: Let me interrupt a moment.

MS. FELDMAN: Excuse me.

THE COURT: How many employees total does KDKA have?

MS. FELDMAN: Your Honor, we are unaware at the moment of how many they have exactly, male and female.

THE COURT: I thought the interrogatories answered that with respect to KDKA, because they listed each department and listed the number of employees.

MS. FELDMAN: Oh, your Honor, I see what you mean.

THE COURT: I haven't counted them up, but I think I could if given enough time, so how many did they say in their interrogatories they had in sum total?

MS. FELDMAN: Your Honor, we have not done the addition ourselves. I'm sorry. So I could not give you exactly.

(7)

THE COURT: Well, now, you say they have 24 female employees.

MS. FELDMAN: Yes.

THE COURT: That's quite a few.

MS. FELDMAN: That's correct.

THE COURT: So on the face of it, it doesn't appear that there is a facially obvious discrimination, does it, if you haven't added up the total?

MS. FELDMAN: Your Honor, there are two answers to that.

First of all, since this is merely a motion -- not merely a motion, but since this is a motion to certify the class, the merits of the case which will go to the establishment of the prima facie case of discrimination are not to be considered at this point by your Honor.

We are merely demonstrating the fact that there are potential members of a class so numerous that joinder is impracticable.

However, as to whether or not discrimination in fact occurs, this will be determined at a later point when we present the prima facie substantive issues that are present in this proceeding.

The second thing is that even if we were to look at that, the fact

that we have not added them up, as we have said, but viewing the fact that there are some women in

(8)

some jobs certainly does not indicate that there is no discrimination practiced by KDKA.

For example, we have noticed that there are very few, if, indeed, any, at this point on-the-air employees who are regularly broadcasting, persons in effect who stand in the same shoes as the plaintiff, Jo Ann Evans Gardner, would have, had she been hired.

To continue, so we have over, well over 300 potential members of a class as to this particular radio station alone.

As we mentioned, there are six other cities involved, and the defendants have not given us any statistics as to those six other cities. Therefore, we have in excess of 323, indeed, it could approach a thousand persons in all who would be potential members of this class, in addition to which we have also alleged a class of persons who have

been -- will be adversely affected by the practices that we allege on the part of Westinghouse Broadcasting Company. That number is unknown.

There is a great number of potential women who would want to enter the broadcasting industry, but because of the practices of this defendant, have been deterred from doing so.

To continue to Section (a)(2) of the rule, we must also demonstrate that there are questions of law and fact

(9)

common to the class.

Now, Judge Mack, in the eastern district of this Circuit, has held that in a class action of this nature which challenges all of the employment practices of a particular defendant, quote, there is no doubt that the class action proposed by plaintiffs satisfied the requirements of the rule.

The resolution of this question, as we see it, depends on whether the discriminations alleged in the complaint are regarded as individual discriminations against proposed members of the class or

as manifestations of a broad, sweeping and all-pervasive policy of an embedded and total racial employment discrimination.

It is true, of course, that since employees are human, they are subject to human variances as to skill, industry and aptitude. It is also true that there are differences as to seniority and job requirements. However, we think that a narrow construction of Title VII would unduly restrict, if not frustrate, the congressional purpose reflected in the passage of this legislation.

Certainly, it would be cumbersome, if not totally unworkable, to require each negro employee at G. E., or each negro refused employment at G. E., to seek redress for alleged grievances individually.

THE COURT: Wasn't that Judge Lord's case?

(10)

MS. FELDMAN: Yes.

THE COURT: You said Judge Mack.

MS. FELDMAN: Excuse me. I meant Judge Lord and this is the case of Mack vs General Electric, which is cited in our brief at page five. Excuse me, your Honor.

THE COURT: But isn't that a little different situation? Let me try to articulate what's in my mind. That was a case where black employees were employed throughout General Electric's plant in all ordinary hourly jobs.

Is there any distinction where a broadcasting company has to find talented people for particular shows that go on the air, for example, not everyone has the talents of, for example, Eleanor Schano, who I think is a KDKA newscaster. I am not sure of that, but I watch the news broadcasts at night, and I guess I can take judicial notice of the fact that she is Eleanor Schano.

MR. FREELAND: Very attractive.

THE COURT: And isn't there some distinction between a factory that manufactures electronics products or toasters or refrigerators of [sic]

dishwashers and a company that entertains the public at night and during the day on the ubiquitous tube that we all see from time to time.

MS. FELDMAN: Your Honor, I do not believe there is, because, as it has been mentioned before, Title VII embodies a broad congressional purpose to eliminate

(11)

discrimination in all aspects of employment, and we have seen numerous cases, for example, particularly as we know in this particular -- in the western district of Pennsylvania, universities involving professional persons, professional women who sought employment as university professors or who were discharged, all of whom basically would not come in unless they had certain qualifications and characteristics, who must demonstrate an ability to fulfill a certain position.

However, there are certain policies that universities maintain, which discourage women from applying -- which discourage women from applying for

promotion and which in fact bar women from promotion even though their individual characteristics and individual histories in terms of education are very important.

THE COURT: Now, as far as I know, and I may be behind in my reading, but as far as I know, there has not been a class action certified in this district involving university professors. Is that true or not?

There is one under consideration, but I don't think it has ever been certified.

MS. FELDMAN: No, it has not been certified as a class as yet, your Honor, but the fact remains that in various different types of Title VII cases and analogous cases under Section 1983 have been brought as class actions, and while I am unable to articulate one specifically and give

(12)

you a case citation at the moment, there are cases that have been certified involving persons who are not factory

workers, for example, people that we view as the mass, for example.

THE COURT: All right. Go ahead with your argument.

MS. FELDMAN: Therefore, viewing the kind of case that we have, this type of broad based attack against all of defendant's policies, it is obvious that there are common questions of law and fact which will be very easily brought up as far as all of the women that we have alleged as being potential class members here. All of them have suffered from the same policies of the defendant, that is, sex discrimination, and, undoubtedly, in terms of the type of discrimination that each have suffered, some will have suffered discrimination of the same sort, in the same factual circumstances as our particular plaintiff, who unsuccessfully applied for employment with the defendant, and there will be those who will have also suffered sex discrimination in which the factual situations may be slightly different, but still similar enough to fit within the broad based

attack against all of the discriminatory practices of the defendant, which has been upheld by the various cases, among them, as I have said before, being Mack vs General Electric in the eastern district.

THE COURT: Is there any reason that this

(13)

should make a difference? I noticed in the interrogatories and the answers to them that some of these women had applied for jobs as stenographers, secretaries. Some of them said they would take any job. Some of them applied for jobs in sales, but the particular plaintiff here applied for a job as a so-called hostess on a talk show.

Why should we concern ourselves with stenographers and secretaries whom we know are frequently females when we are really concerned with the glamorous jobs?

MS. FELDMAN: Your Honor, first of all, as I have said, this is a broad based attack against all of the employment practices of this particular

defendant. That would encompass their activities and their prohibitions and promotional policies with respect to women in all aspects of employment, but isn't it true that the type of problem that women most often face is that they have no choice but to be hired in certain areas and certain areas alone.

For example, isn't it conceivable that our plaintiff, Dr. Gardner, would only have been considered for what we might think of as a traditional female type job, but not for a job as talk show host, which they obviously view as a male type job. Otherwise, they would not have refused to consider her for the position. They would not have advertised specifically for a male talk show host.

In effect, women may have very easily been

shoe-horned into certain positions by the defendant solely because the defendant has viewed certain jobs as, quote, female jobs, and certain jobs as male jobs, and once women get employed by the defendant in one of these, we could call it, more female areas, and

sought promotion to an official or a managerial position, or even a job as an on-the-air member of their broadcasting personnel, has been blocked because the defendant refuses to consider women for certain positions, which is basically the most important aspect of discrimination which we are alleging against this particular defendant. They are in effect sterotyping women and putting them into certain positions and not considering them for others, so women in all areas are being in effect stifled, and in addition to that, because of this policy, because of the fact that Westinghouse does not put women on the air, women everywhere who might consider broadcasting careers are being deterred because they do not hear female voices on the stations operated by the defendant.

So there are women in all kinds of jobs that have been stifled in one way or another. Perhaps some of the stenographers there came to defendant in the first place because they really wanted to be involved in the managerial aspects of a radio station or because

they really wanted to be on the air, but this was the kind of job they were offered and that was it as far as the station was concerned.

(15)

To continue, perhaps the most obvious threshold problem which your Honor may have recognized as presented by this particular case is the fact that the named plaintiff, Dr. Gardner, was a rejected applicant, but, as we have mentioned many times before, she seeks to represent all employees, past and present, conceivable future employees and also those who have been discharged and those also who have been rejected, who have applied, and persons who have been deterred from applying because of the policies of this particular defendant.

As a result the question arises as to whether or not the requirements of Rule 23 (a)(3) [sic] that there be adequate representation by the named plaintiff have been satisfied. The first prong of this rule, as has been identified by the Third Circuit in the recent case of Wetzel vs Liberty Mutual

Insurance Company, which Mr. Hackett has already mentioned, is that the plaintiff's attorney should be able to diligently prosecute this action.

Mr. Hackett has been involved in several discrimination actions in this district and has been eminently successful, and we would say, certainly, that the first prong of the Wetzel test has been satisfied.

As to the second test, we must demonstrate under Rule 23 (a)(3) [sic] that the interests of our plaintiff are not antagonistic to the interests of the other potential class

(16)

members.

Wetzel specifically held that employees who voluntarily left the employment of Liberty Mutual Insurance Company could still represent a class of present, future and past employees, it appearing to the court that the named plaintiffs had the same interest, although they were former and voluntarily quitting employees. These women had the same interest in combating Liberty Mutual's

discriminatory policies as the present female employees.

The interests, therefore, of the former employees were not antagonistic to those of the present employees.

In this case, then, we see the same situation. The interests of Dr. Gardner in assuring that there be open employment opportunities for women are similar to the interests of past and present employees; that there be such open employment practices by the defendant.

Her interests are not antagonistic to those of the class.

Additionally, there have been other cases including circuit court cases, most notably in the Fifth Circuit, that have found that an applicant is an adequate representative of all who allege a broad across the board attack against the defendant's employment policies.

For example, Carr vs. Conoco Plastics, which is

cited in our brief at page ten, involved an applicant who sought to challenge practices that only occurred in the plant. The defendant

objected on the grounds that the plaintiff could not represent persons in the plant that she had no knowledge of, and policies in the plant that she never suffered herself.

The court stated that after the EEOC had been involved as an amicus in that particular case, the commission's brief and argument relate solely to the question of whether in a suit brought pursuant to the act by persons claiming that an employer has violated the act by refusing to hire them because of their race may also allege and seek to enjoin other unlawful employment practices committed by the same employer, if those practices, although not directly injurious to them at the time of their application for employment, potentially affect them because of their race. The court holds that they can.

It is foolhardy to say that once plaintiffs have removed racial discriminatory policies at the door, they are required to start anew in order to remove those that exist on the inside. Such a practice would result in a

multiplicity of suits and a waste of time and money for all interested parties.

So, again, it is amply demonstrated in the sense that Rule 23 was formulated in order to prevent a multiplicity of suits. It is obvious that this plaintiff, who challenges all of the policies of the defendant, can

(18)

represent those who have experienced policies and practices different than she has experienced herself.

This, as I said, is an across the board attack and, therefore, she can represent those who have suffered different discriminatory policies of the defendant, and this position has also been taken, besides the court in Carr, in two recent cases, which are part of the brief that we have handed up to your Honor, one being Lewis vs J. P. Stevens & Co., a district court case, and the other being Barnett vs W. T. Grant, a circuit court case in the south. All have again said that an accross the board attack enables an applicant to

represent present and future and discharged employees.

Finally, having seen that the requirements of sub-Section (a), Rule 23, have been satisfied, we go to the question of whether or not this action is properly maintainable under Rule 23 (b)(2), under which we have brought it, and as to this question, the recent Third Circuit opinion in Wetzel vs Liberty Mutual Insurance Company is determinative. Wetzel held that a sex discrimination case which envisions at the outset primarily injuctive relief, as this one does, we hope to establish affirmative action policies on the part of this defendant, and incidental claims for monetary damages is properly a case under Rule 23 (b)(2) and notice need not be made at this point.

Therefore, since the Third Circuit holds that

(19)

this is a 23 (b)(2) class action under Wetzel, this case at bar is properly maintainable under that aspect of the rule.

Finally, we are claiming that this is a systemwide or nationwide class action. As we mentioned before, the defendant operates the radio stations in seven cities, in Boston, in New York City, in Philadelphia, in Pittsburgh, Fort Wayne, Indiana, Chicago, Illinois and Los Angeles, California, and we claim that there is a common policy and practice of discrimination which prevades all of these radio stations.

There are cases which have certified nationwide classes, not even merely systemwide classes. One which we have recently cited to you is Wetzel, which was a nationwide class, and following Wetzel, it is interesting to note the recent case of Polston vs Metropolitan Life Insurance Company, which has had a varied history in a lower court, but the two most recent opinions are cited in our supplemental brief which we have just handed to your Honor.

The Polston case originally established subclasses as to seven states only for monetary damages, although

it allowed a nationwide class as to injuctive relief, but after the Wetzel case, the court reversed itself in effect and determined that that was a Rule 23 (b) class action which could be maintained as to damages and as to injuctive relief on the part of employees and class members that were involved

(20)

in every office maintained by the defendant in the United States.

And this case, as I said, is similar. Should there be manageability problems which we do not envision, since we are only dealing with seven cities and not the nation, but should there me [sic] manageability problems, subclasses can be formulated, as has been approved by the case of Johnson vs. Georgia Highway Express, Incorporated. Therefore, as we have demonstated, the case law shows that we have met the requirements of Rule 23 (a)(1) through (4) and Rule 23 (b)(2), so that this class should be certified as a class action as to the seven radio stations operated by the defendant in the United States.

Thank you, your Honor.

THE COURT: Thank you.

MR. HACKETT: Your Honor, before the defendant appears, I would like to state that the interrogatories propounded to the defendant were very carefully entitled "Interrogatories to Determine a Class Action", and in our request for the employees, we were very careful to direct it only at the 23 (a) parts of the class action. For instance, we said, "State the number of female employees." We were not trying to show a substantive prima facie discrimination case based on statistics, but rather to show that there existed the requisite number of female employees or applicants to meet

(21)

the numerosity requirements of a class action.

In fact, I think it is improper procedure to go into substantive discovery in a class action case before it has been determined whether or not it is a class action, and we tried to follow that rule. Thank you.

THE COURT: All right. Thank you. Mr. Freeland.

MR. FREELAND: May it please the court, I will introduce two of my colleagues who are not going to participate in the argument, though they argue with me from time to time. Mr. Kronz is with the beard and Mr. Webb is without the beard.

I believe that some recitation of relevant facts is necessary in this case for the court to get the flavor of the matter that is before it.

Dr. Gardner, Jo Ann Evans Gardner, as revealed in the answers to the interrogatories and the plaintiff's brief, is a prominent woman who has been a professor of psychology. She read, not an advertisement in the newspapers, but in Win Fanning's on-the-air column, a word or two about who was going to replace Ed and Wendy King, since Ed King had died. Wendy King was a woman and is a woman, and filled a nine to twelve spot when they didn't have night-time baseball.

Dr. Gardner thereupon called Mr. Peterson at the station, the radio station, went down and said, "I would

like to be a talk show person." After some discussion, she left. She was not hired. It was the position at all times that she was

(22)

not qualified.

In her answers to interrogatories propounded by the defendant, she has set forth that this is the only time in her life when she has sought employment in the broadcasting industry with this station or any other station.

It so happens KDKA is the oldest station in the country and maybe it is best to begin at the top.

Thereafter Dr. Gardner filed a complaint before the Equal Employment Opportunity Commission. That complaint is appended to the complaint in this case, and it becomes somewhat important, I believe, in aiding the court in the disposition of the motion to certify the class. Her complaint was against KDKA Radio.

The investigation related to KDKA Radio. The finding of non

discrimination by the EEOC related to KDKA Radio.

One of the problems that we have in class actions under Title VII is that before we get to the point of certifying a class, we must be mindful of the scope of charge provision of Title VII, and it may be indeed true with an unsophisticated and unprominent person that one should not be punished for filing something with the EEOC which is not a lawyer-like -- a review of the charge of discrimination as signed by Dr. Gardner will indicate that it is learned and lawyer-like or even psychologist-like or professorial.

I suppose I did not file a brief in this case,

(23)

your Honor, because whenever I am afforded the opportunity not to do so, I choose not to do so, and, secondly, because, I suppose, I believe with Mr. Justice Black, who dissented from the 1966 amendments to Rule 23. His dissent is recorded at 383 U. S. 1035.

I particularly think that every member of the court should examine with great care the amendments relating to class suits. It seems to me the Justice said that they place too much power in the hands of the trial judges and that the rules might almost as well simply provide that, quote, class suits can be maintained either for or against particular groups whenever, in the discretion of the judge, he thinks it is wise, end quote, and I recite this because precedential value of the cases cited by the plaintiff in this case or cases that could have been cited by me is limited, and Wetzel, with former employees who had specifically been told about certain things, is unlike the matter of someone reading in a news column about a vacancy and going down and saying, "I want that job because I have a natural talent for it."

I suppose I never realized what qualifications were involved for a talk show person until I almost demanded why couldn't I be one. I am articulate. I know about baseball and basketball and

law and a few other things, and I am certain that I could interact with people on the telephone, and perhaps I could be a talk show person at some stations, I was

(24)

told, but not here.

A second general consideration in addition to the, I suppose, warning that some cases do not have such great precedential value, I point out, for instance, the Johnson case upon which my colleagues rely so much. When that case was remanded to the district court in Atlanta, it was not a systemwide disposition, but a disposition only as to the Atlanta plant, and, as a matter of fact, the judge in that circuit, the Fifth, who concurred, I think it was Judge Goldbold, [sic] but I am not really sure, has later written an opinion which makes more explicit the Fifth Circuit's attitude toward across the board cases.

I find, for instance, in my research, and I am sure my colleagues have, that Judge Mehrige, in two different cases, in one case said, "I will

certify across the board," and in another case involving schoolteachers throughout the Commonwealth of Virginia, chose not to certify as a class because there were many factors and facts which were relevant to his determination, and some of those factors are relevant here.

For instance, and I really get to the Title VII scope of the charge proposition, KDKA radio, and the exhaustion of the remedies available under the Act, because the doors of this court are not open to everyone who claims sex discrimination or race discrimination --

(25)

The doors of the court are open only to those who follow the administrative procedures set forth by the Congress, and when that administrative procedure has been begun, it is expected by the Congress, it is expected by the courts that there will have been an exhaustion of such remedies before one gets to the court.

There is not in this case because Dr. Gardner said KDKA Radio

only, nothing about WBZ, in fact, nothing about television station KDKA and nothing about any of the other stations, and, therefore, there has not been the opportunity for the administrative agency with the expertness as required by the Congress and with the obligation as required by the Congress to get into the act.

Rather, Dr. Gardner brings the claim against everybody in the act for the first time in this particular lawsuit.

The numerosity aspect of Rule 23 is not one which I will belabor, because I have two -- there is basically two alternatives. If this court were to certify an across the board matter, which in the first instance requires saying we will bring in the other six radio stations, as to whom no investigation has been held as of this date, and then if we submit to this court all of the records of all of the people, the class will clearly be so numerous, because indeed, we are not restricted just to those seven radio stations,

(26)

because the theory of the plaintiff is, as I read its brief, that anybody who has ever wanted to work in radio is a potential member of this class.

I suppose I can remember Ted Husing years and years ago, and I certainly wanted to be like Ted Husing. I didn't go to broadcasting school, and I didn't get hired, but that's how big the class would be, if, in fact, the court ruled that six other stations should be involved, or that Dr. Gardner is representative of all persons who ever wanted to go into the performing side of radio.

I think that my colleague and the court have both pointed out that on the air is more glamorous, if that is not a sexist word, than working in the office. It is not only more glamorous, it is also more remunerative, and it is much more remunerative at a large and an old station than it is at a small and new station.

The other aspects of Rule 23, other than the numerosity factor, and

all of the literature in 23, so overlap that it is very difficult to examine them as microscopically as Mr. Hackett has done in his brief, but let us assume that there has been a class of persons who have been discriminated against by KDKA Radio because of sex. Do the issues of law and fact which are common to the discrimination against the stenographer or against the person who thought he wanted or she wanted to go into radio, do these issues

(27)

predominate with Dr. Gardner's issue?

THE COURT: That's what I was exploring a little bit with your learned opponent here. It seems to me that if a woman applied for a job with MGM as a movie actor destined to take the lead in a new cowboy-indian picture, and they turned her down, her claims would not be similar to a stenographer who applied to MGM to work in the office and who was turned down, because while it is nebulous and hard to articulate, this really concerns whether talented persons have been discriminated against,

vis-a-vis ordinary people like you and me.

Is that a distinction or is that purely a --

MR. FREELAND: I think it is really at the nub of it, and I have talked to some people about discrimination cases. I love to play basketball, but I am five feet six. Now, if I went to The Boston Celtics, which is my favorite team, and said, "I want to play basketball because I really have a natural talent," and I am not hired, and there was a time, you know, when they only had maximum five black guys on the team, but if I went there at five feet six, was that the reason I wasn't hired, or was it because of racial discrimination? And, in fact, there may have been racial discrimination in the basketball system at that time, but was that the reason that a five foot six -- and, really, I am five feet five and three quarters, your Honor -- was that the

reason that I was not hired? And I can want to and think to and believe it all,

but I just am not as good as Bill Russell, and I am not as good as John Havlechak, and I think this is the nub of it.

This is not like some of the cases that Judge Johnson, for instance, disposed of by dissent [sic] decree in Alabama. It is not like the Wetzel case.

We have a unique situation.

THE COURT: All right.

MR. FREELAND: A talent as opposed to gross activity.

THE COURT: I don't want to hurry you up, and I am interested in everything you say, but I have got another group of lawyers coming in here at 4 o'clock,and I have got to give them some attention. Go ahead. Make your points.

MR. FREELAND: Well, I think in effect, I think the court -- my basic -- I have two basic positions; one, that you could read all the cases you want to, and this is not going to help you with being a talk show person to replace Ed and Wendy King at KDKA Radio.

Now, I have no question about it in my mind that if KDKA Radio said in the newspaper, in a big ad, "We want a man to replace Ed and Wendy King," and if they put down in front of their door, "No women need apply," that there would be some merit in the plaintiff's case and the certification

(29)

of the class, but my basic position is, one, we must deal with the scope of the charge as it relates to the members of a potential class beyond the membership of those people at KDKA Radio alone, and KDKA Radio gets a lot of applications for a small operation. You have had the figures in interrogatories and show that in 120 days, how many applications. Everybody wants to get in on the act, some as stenographers and some as performers, some as managers.

THE COURT: Well, in sum, your position is that this isn't a class action at all, but an action by Dr. Gardner to determine whether she was discriminated against because she was a

woman or because she didn't have the qualifications to carry out the show.

MR. FREELAND: I think this is really what it is, and one final word, your Honor, since I thought I was going to be down here at 4 o'clock and not at 3, that's why I forgot about the time, but let me point out one final thing. If you read the answers to the interrogatories propounded by the defendant to the plaintiff, why did you bring this litigation, and she said to get a job, to get this particular job at KDKA, and I suggest if that's really her purpose, she is not representative of the class. The class is not going to be adequately represented because there are going to be countless members of a potential class who are going to be excluded from the job by reason of the fact that Dr. Gardner wants it and is

(30)

asking the court to give it to her.

I will read the supplemental brief of the plaintiff, your Honor. I do not think that I will submit a

memorandum of law, because I believe this case is much different from the cases cited, and I feel that trying to analyze and analogize each of the cases in this field really is of no aid to the court.

If the court gets the feel of the facts and the feel of the acts involved in this particular case, it seems to me it will have no trouble in refusing the motion to certify.

THE COURT: Well, you file an answer in brief if you care to. The reason that I said that I didn't require briefs is, as you might assume, I have now accumulated a great many briefs on class action. They have cited the leading cases. I make no claim that I understand all of them or that I'm very clear about what the various cases do hold, and I'll confess I haven't read all the class action cases. I don't think anybody can and do the other work that's required. But I wanted to hear the oral argument more than I wanted to read briefs, and try to analyze what the matter was about.

If you intend to file a brief, will you do it in twenty days?

MR. FREELAND: Oh, yes, your Honor.

THE COURT: Now, we have a deadline on discovery.

MR. FREELAND: I think it is December 1.

(31)

THE COURT: I have set discovery for the end of the year, actually, December 1st, and that might not be sufficient time to give Mr. Hackett. I recognize that he has to have a ruling on this motion of his before he knows how to proceed or how extensively to proceed.

I'm going to be gone for a period of two weeks on assignment to the Eighth Circuit, and I probably will be back here in about 15 days, and if you have a brief, I'll read it at that time, and I'll try to give you a rather -- I will try to give you a rather prompt ruling then. If you need more time, you can agree upon it.

MR. FREELAND: I think the last order was that obviously the time for discovery would be extended until after your motion to certify.

THE COURT: Well, it has been, and if you need more time due to my slowness, I will give it to you. I must confess to you I have more piled up than I can get to, and I will be forced to be absent for two weeks.

MR. HACKETT: In closing, your Honor, I would just like to respond to Mr. Freeland by calling your attention to Rich vs Martin Marietta Corporation, which says something that I am sure is true for trial judges. It says, by the lower court, who so very limited the class, if the cases were always limited as they were in this case, it would effectively make Rule 23 a nullity. It is understandable that hardpressed

trial courts would not consider this too unfavorable a result, but the test of validity or continued existence of the rule is not the difficulty or complexity

of administration. So long as Rule 23 is on the books, it must be given effect.

THE COURT: I understand.

MR. HACKETT: And I think that Mr. Freeland argued the facts of the case as all people do when they don't want a class determined, and as Eisen vs Carlisle says, you cannot get into the facts of the case under Rule 23. You must determine if there is a class.

THE COURT: I have been admonished along that line many times, and I recognize the language. All right, gentlemen.

(Whereupon, at 4:12 o'clock p.m., the oral argument was concluded.)

C E R T I F I C A T E

I hereby certify that the foregoing is a full, true and correct transcript of Proceedings of Oral Argument held on October 30, 1975, in the United States District Court for the Western District of Pennsylvania, at Pittsburgh, Pennsylvania, in the matter at Civil Action No. 75-614, before the Honorable Barron P. McCune, District Judge.

s/Margaret K. Mimless
Margaret K. Mimless
Official Reporter

Pittsburgh, Pennsylvania
March 4, 1976

UNITED STATES DISTRICT COURT,
W.D. PENNSYLVANIA.

JO ANN EVANS GARDNER
v.
WESTINGHOUSE BROADCASTING COMPANY
Civil Action No. 75-614
February 3, 1976.

MEMORANDUM AND ORDER

[Memorandum and Order of the United States District Court for the Western District of Pennsylvania appears in the Appendix to the Petition for a Writ of Certiorari at pages 34a through 40a]

[Title omitted in printing]

NOTICE OF APPEAL

NOTICE is hereby given that the named plaintiff, Jo Ann Evans Gardner, on her own behalf as a representative of the class and on behalf of the class she seeks to represent, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order of the Honorable Barron P. McCune of February 3, 1976 pursuant to 28 USCA §1292(a).

BASKIN, BOREMAN, WILNER,
SACHS, GONDELMAN & CRAIG

By s/Robert N. Hackett
Robert N. Hackett

s/Joan P. Feldman
Joan P. Feldman

Attorneys for Plaintiffs

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 76-1410

JO ANN EVANS GARDNER
v.
WESTINGHOUSE BROADCASTING COMPANY,

Jo Ann Evans Gardner, on her own behalf as a representative of the class and on behalf of the class that she seeks to represent,
Appellant

Appeal From the United States District Court for the Western District of Pennsylvania

(D.C. Civil Action 75-614)

Submitted Under Third Circuit Rule 12(6)
March 28, 1977
Before: Seitz, Chief Judge, and Aldisert and Hunter,
Circuit Judges.

OPINION OF THE COURT
(Filed June 6, 1977)

[Opinion of the United States Court of Appeals for the Third Circuit appears in the Appendix to the Petition for a Writ of Certiorari at pages 2a through 21a)

UNITED STATES COURT OF APPEALS
For the Third Circuit
No. 76-1410

JO ANN EVANS GARDNER
vs.
WESTINGHOUSE BROADCASTING COMPANY,
Jo Ann Evans Gardner, on her own behalf as a representative of the class and on behalf of the class that she seeks to represent,
Appellant

(D.C. Civil Action No. 75-614)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, Chief Judge and ALDISERT and HUNTER, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit Rule

12(6) March 28, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the motion to dismiss the appeal from the judgment of the said District Court filed February 4, 1976, be, and the same is hereby granted. Costs taxed against the appellant.

ATTEST:
s/Thomas F. Quinn
Thomas F. Quinn
Clerk

June 6, 1977

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 76-1410

JO-ANN EVANS GARDNER
v.
WESTINGHOUSE BROADCASTING COMPANY,
Jo Ann Evans Gardner, on her own behalf as a representative of the class and on behalf of the class that she seeks to represent,

Appellant

SUR PETITION FOR REHEARING

(Order of the United States Court of Appeals for the Third Circuit denying Petition for Rehearing and Opinion Sur Denial of Petition for Rehearing appear in the Appendix to the Petition for a Writ of Certiorari at pages 22a through 33a).

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-560

JO ANN EVANS GARDNER,
Petitioner

v.

WESTINGHOUSE BROADCASTING COMPANY,
Respondent

On Petition for a Writ of Certiorari to
The United States Court of Appeals For
The Third Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

WENDELL G. FREELAND
RICHARD F. KRONZ
JOSEPH F. GROCHMAL

FREELAND & KRONZ
409 Plaza Building
Pittsburgh, PA 15219
(412) 471-5287

Attorneys for Respondent
Westinghouse Broadcasting
Company

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

INDEX

CITATIONS

CASES:

STATUTES AND RULES

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-560

JO ANN EVANS GARDNER,
Petitioner

v.

WESTINGHOUSE BROADCASTING COMPANY,
Respondent

On Petition for a Writ of Certiorari to
The United States Court of Appeals For
The Third Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A) and Opinion Sur Denial of Petition for Rehearing (Pet. App. B) are reported at 560 F.2d 209. The opinion of the District Court at No. 75-614 (W.D. Pa.) is not officially reported. (Pet. App. C)

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1977. The petition for a writ of certiorari was filed on October 13, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a denial of a class certification in a Title VII action is, per se, an immediately appealable order under 28 U.S.C. §1292(a)1 as an order constituting a denial of an injunction where the potential class representative is unable to meet the requirements of Fed. R. Civ. P. 23.

STATUTE AND RULE INVOLVED

28 U.S.C. 1292(a) provides in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> * * * * *

Rule 23, Fed. R. Civ. P., provides in pertinent part:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate

final injunctive relief or corresponding declaratory relief with respect to the class as a whole; * * *

* * * * *

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

STATEMENT

Petitioner Gardner unsuccessfully applied for employment with respondent Westinghouse Broadcasting Company's subsidiary station, KDKA, Pittsburgh, Pennsylvania. Thereafter, she filed charges of sex discrimination in the employment practices of respondent with the Equal Employment Opportunity Commission (EEOC) and the Pittsburgh Human Relations Commission. The EEOC found no cause in the charge and so notified petitioner.[1]

She then filed a complaint in the District Court for the Western District of Pennsylvania under Title VII of the 1964 Civil Rights Act, 28 U.S.C. §2000(e) *et seq.* seeking relief for herself and on behalf of the class she wished to represent.

Gardner asked the district court to determine a class. A hearing on her request was held on October 30, 1975. By memorandum opinion and order of February 4, 1976, the district court denied the requested class certification.

The court found that Gardner had not satisfied Rule 23(a)(2), Fed. R. Civ. P. because there were "no questions of law of fact common to the class she sought to represent" (Pet. App. C at 38a-39a). Nor had she satisfied Rule 23(a)(3), Fed. R. Civ. P. because her claim was "not typical of the claims of the members of the proposed class" (Pet. App. C at 39a). Nor had she satisfied Rule 23(a)(4), Fed. R. Civ. P. because she could not

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1. The Pittsburgh Human Relations Commission did not act on Petitioner's charge at *her* request that the matter be referred to the EEOC. (See Answer to Defendant's Interrogatory No. 6, Court of Appeals Appendix, p. 56A.)

fairly and adequately protect the interests of the purported class (Pet. App. C at 39a).

Without seeking or obtaining a certificate under 28 U.S.C. §1292(b), petitioner filed an appeal from the district court's order. She relied upon 28 U.S.C. §1292(a)1. For such jurisdictional base, she claimed a denial of injunctive relief.[2] Respondent Westinghouse filed a motion to dismiss the appeal for lack of jurisdiction.

Respondent Westinghouse's motion to dismiss was granted under order and opinion[3] of the Third Circuit dated June 6, 1977. The Court of Appeals held that to allow such an interlocutory appeal, absent qualification under any of the special judicial or legislative exceptions to the "final judgment rule" would frustrate the long-standing policy against affording pricemeal appellate review[4] and that §1292(a)1 was not designed to allow such an appeal where the order appealed from did not substantially affect or result in irremediable consequences to the outcome of the litigation. It concluded that the refusal to certify is always reviewable. It rejected the argument that the order of the district court caused immediate and drastic consequences.

Petitioner has now applied to this Court for a writ of certiorari to review the judgment of the Court of Appeals.

---

2. She has now modified this by asserting in her petition that the permanent injunction she sought is the "heart" of the relief she sought. In her answers to interrogatories, however, she stated she filed suit because she wanted a job for herself: (Defendant's Interrogatory No. 4, p. 55A, Court of Appeals Appendix.)

3. Pet. App. A.

4. *Katz v. Carte-Blanche,* 496 F.2d 747 (3rd Cir. 1974).

ARGUMENT

1. The Court of Appeals was correct in concluding that the order of the district court denying class action certification was not a refusal to grant an injunction appealable under 28 U.S.C. 1292(a)(1). It noted (Pet. App. at A 6a) that a decision on class status "may be conditional, subject to alteration or amendment prior to final judgment, Fed. R. Civ. P. 23(c)(1)."

The court carefully considered the exceptions to the general rule on appealability. It followed the guidelines of this Court as expressed in *Switzerland Cheese, Inc. v. E. Horne's Market, Inc.,* 385 U.S. 23 (1966) and *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 249 (1955). It relied specifically upon this Court's holding that the §1292 exception to the finality doctrine is strictly limited and should not be expanded by *ad hoc* judicial exceptions.

This Court's recitation in *Baltimore Contractors, supra,* citing *City of Morgantown v. Royal Insurance Co.,* 337 U.S. 254, (1948), is dispositive of the matter:

> "Many interlocutory orders are equally important, and may determine the outcome of the litigation, but they are not for that reason converted into injunctions."

Given the nature of the Rule 23 order[5] and the scope of relief available generally in Title VII[6], no other result could be reached.

---

5. Fed. R. Civ. P. 23(c)(1) provides that ". . . An order under this subdivision may be conditional and may be altered or amended before the decision on the merits."

6. Even in the case of an individual plaintiff under Title VII, the district court is empowered to enjoin a

Further review is not warranted.

2. Petitioner contends that there is a conflict between the views of the Third Circuit and the views of some of the other circuits. If, however, her case is measured by the standards of those other circuits—to the extent that such are different from those used by the Third Circuit—she would still fail.

By the standard of every circuit, she must demonstrate that injunctive relief was the heart of the litigation she instituted. Her failure so to do would be fatal to her hope for piecemeal review.

Petitioner herself described the heart of her case in answers to interrogatories:

> "4. Is your primary motivation in bringing this law suit to secure employment for yourself?
>
> "Answer: Yes." (Court of Appeals Appendix, 55a)

Further, as Chief Judge Seitz of the Third Circuit noted in his concurring opinion (Pet. App. A, 11a), Gardner did not request preliminary injunctive relief. She sought only permanent relief—relief which may be granted only after disposition of the entire case on the merits.

It should be apparent that her present effort to modify the primary purpose of her suit is no more than an example of the resiliency of a disappointed litigant.

In sum, she has failed to demonstrate that injunctive relief is the primary purpose of the suit. To the contrary,

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respondent from engaging in any "unlawful practice charged in the complaint" and to order "such affirmative action as may be appropriate." 42 U.S.C. 2000(e)-5(g) and 42 U.S.C. 2000(e)-16(d).

she has demonstrated that injunctive relief is *not* the primary purpose of her suit.

Thus, the conflict among the circuits she purports to see disappears when the particulars of her case are examined.

3. Two other arguments against granting review should be mentioned.

First, under this Court's holding in *United Airlines v. McDonald,* —— U.S. ——, 97 S. Ct. 2464 (1977), if petitioner loses in her individual claim and even if she chooses not to appeal, a member of the putative class may intervene and appeal from the denial of class certification.[7] Were petitioner to prevail in her individual claim, she would still be able to appeal from the class action certification denial, as so painstakingly explained by Chief Judge Seitz (Pet. App. A. at 13a-21a).

Second, this case does not warrant further review because petitioner's class action contentions were properly rejected by the district court. (See pp. 5 & 6, *supra*)

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7. The propriety of the district court's ruling concerning atypicality would be reinforced were Gardner to fail in her individual claim.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

WENDELL G. FREELAND
RICHARD F. KRONZ
JOSEPH F. GROCHMAL
FREELAND & KRONZ

409 Plaza Building
Pittsburgh, Pennsylvania 15219

Counsel for Respondent,
Westinghouse Broadcasting
Company

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-560

JO ANN EVANS GARDNER,

Petitioner,

v.

WESTINGHOUSE BROADCASTING COMPANY,

Respondent.

BRIEF FOR PETITIONER

ROBERT N. HACKETT

JOAN P. FELDMAN

BASKIN, BOREMAN, WILNER
SACHS, GONDELMAN & CRAIG
10th Floor Frick Building
Pittsburgh, PA 15219

Counsel for Petitioner,
Jo Ann Evans Gardner

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-560

JO ANN EVANS GARDNER,

Petitioner

v.

WESTINGHOUSE BROADCASTING COMPANY,

Respondent

ERRATA TO BRIEF FOR PETITIONER

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1. At page vi the first citation on the page, "Abercrombe" should read "Abercrombie". The last citation on the page should read, Brunson v. Board of Trustees of School District No. 1, 311 F.2d 107 (4th Cir. 1963), cert. denied, 373 U.S. 933 (1963).

2. At page xii, the second citation on the page should read, Roberts v. Golden Gate Disposal Co., 556 F.2d 588 (9th Cir. 1977), cert. denied sub nom Sunset Scavenger Co. v. Roberts, 46 U.S.L.W. 3219 (1977).

3. At page xv, the fourth citation on the page should read, 28 U.S.C. § 1343(4)(1970). The fifth citation on the page should read, 28 U.S.C. § 2201, 2202 (1970). The sixth citation on the page should read, The Civil Rights Act of 1964, Title VII, § 706, 42 U.S.C. § 2000 e-5 (1970 and Supp. V 1975).

4. At page 15, the fourth line in the last paragraph on the page should read, "a pattern and practice or class action.".

5. At page 25 in the second full paragraph, the sixth line, "what types of order constitute the" should read "what types of orders constitute the".

6. At page 27, in the fifteenth line from the top of the page the word "comtemplation" should read "contemplation".

7. At pages 36-37 in the last three lines on page 36 and the first two lines on page 37, the citation should read, Roberts v. Golden Gate Disposal Co., 556 F.2d 588 (9th Cir. 1977), cert. denied sub nom Sunset Scavenger Co. v. Roberts, 46 U.S.L.W. 3219 (1977).

8. At page 40 in the seventh line in the third paragraph of footnote 13, "pursuant to 28 U.S.C. § 1292(a)(1)" should read "pursuant to 28 U.S.C. § 1291".

9. At page 42, the citation in the eighteenth line, "Abercrombe" should read "Abercrombie".

Petitioner apologizes for any inconvenience to the Court occasioned by our delay in identifying these errors.

Respectfully submitted,

Robert N. Hackett

Joan P. Feldman

BASKIN, BOREMAN, WILNER,
SACHS, GONDELMAN & CRAIG
10th Floor Frick Building
Pittsburgh, PA 15219

INDEX

INDEX

INDEX

INDEX

INDEX

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

I.

OPINIONS BELOW

The opinion dated June 6, 1977 of the United States Court of Appeals for the Third Circuit, the order denying the petition for rehearing and the dissenting opinion sur denial of petition for rehearing dated July 22, 1977 are officially reported at 559 F.2d 209 (3rd Cir. 1977).

The opinion dated February 3, 1976 of the district court denying class action certification has not been officially reported. (It is printed in the Appendix to the Petition for a Writ of Certiorari at pages 34a through 40a.)

II.

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment and opinion of the United States Court of Appeals for the Third Circuit dated June 6, 1977. A petition for rehearing was denied by the United States Court of Appeals for the Third Circuit by order entered July 22, 1977. On October 14, 1977, a petition for a writ of certiorari was filed, invoking this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1)(1970). This Court granted the petition for a writ of certiorari by order dated December 5, 1977.

III.

STATUTES INVOLVED

28 U.S.C. § 1292(a)(1)(1970) provides:

> "(a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court"

Rule 23 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 23, 28 U.S.C. is set forth in full at 1a - 6a, infra.

IV.

STATEMENT OF THE QUESTION PRESENTED

In an employment discrimination action instituted under Title VII of the Civil Rights Act of 1964, where a class-wide permanent injunction is the primary relief sought; is the denial of a motion to certify a system-wide class immediately appealable as an interlocutory order refusing an injunction pursuant to 28 U.S.C. § 1292(a)(1)?

V.

STATEMENT OF THE CASE

A. Proceedings in the District Court

1. Complaint

The instant action was commenced by the filing of a complaint in the United States Court for the Western District of Pennsylvania on May 29, 1975 (A. 1a, 6-17a).[1/] Federal jurisdiction was grounded on Section 706 of Title VII of the Civil Rights Act of 1964, (hereinafter "Title VII"), 42 U.S.C. § 2000e-5 (1970 and Supp. V 1975); 28 U.S.C. § 1343(4)(1970); 28 U.S.C. §§ 2201, 2202 (1970) (A. 6a).[2/]

1/ The designation "A." refers to the Appendix filed in this Court and the designation "P." refers to the Appendix to the Petition for a Writ of Certiorari; any references to the original record not included in the Appendix will be preceded by the designation "R.".

2/ The complaint also included a pendent state claim under Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania (A. 13a-14a).

Statement of the Case

The named plaintiff, Jo Ann Evans Gardner (hereinafter "Gardner") claimed that Westinghouse Broadcasting Company, (hereinafter "Westinghouse") maintained and continues to maintain a policy, practice, custom and usage of discrimination against females as a class in violation of Title VII and Article I Section 27 of the Constitution of the Commonwealth of Pennsylvania. (A. 7a-8a, 10a-11a, 13a-14a, 15a-16a)

Gardner, an unsuccessful applicant for employment as a radio talk show host, stated that she had fulfilled the administrative prerequisites to filing an action in federal court (A.-1a, 12a-13a, 16a-17a).[3/]

3/ The complaint reveals that Gardner filed a charge of discrimination with the Equal Employment Opportunity Commission (hereinafter "EEOC") within the time period specified by Section 706 of Title VII, 42 U.S.C. § 2000e-5. Thereafter, the EEOC issued a determination of reasonable cause and a notice informing Gardner of her right to file a civil action. Gardner instituted this action within ninety (90) days of her receipt of that notice (A. 1a, 12a-13a, 16a-17a).

Statement of the Case

Under the authority of Fed. R. Civ. P. 23, Gardner brought the action on her own behalf and on behalf of a class of females adversely affected by Westinghouse's discriminatory employment practices. The perimeters of the putative system-wide class were described in the complaint as: past, present and future female employees; unsuccessful female applicants; females deterred from applying to Westinghouse by its reputation in the community for denying equal employment opportunity; and females who will not in the future be considered for certain positions on account of their sex (A. 8a-9a, 11a-12a). The class members were described as being aggrieved by Westinghouse's alleged policy and practice of maintaining sex segregated job classifications; failing to hire, promote, and assign females on the same basis as males; failing to accord females equal consideration for employment and equal opportunities; and maintaining a posture of denying equal opportunity which effectively discouraged females from seeking employment (A. 10a-11a, 16a-17a).

Because she and the class had no complete or adequate remedy at law, and were suffering and would continue to suffer from Westinghouse's discriminatory practices, the primary relief requested by Gardner on her own behalf and on behalf of the class was a permanent injunction to prevent Westinghouse from continuing to abridge her and the class' rights (A. 13a-14a). Gardner also sought ancillary relief to require Westinghouse to make all affected females whole by back pay and otherwise and to pay reasonable attorneys' fees (A. 14a-15a).

2. Motion to Determine a Class Action and Discovery

In accordance with the requirements of Fed. R. Civ. P. 23(c)(1) and Local Rule 34(c) of the Rules of Court of the United States District Court for the Western District of Pennsylvania, Gardner filed a motion to determine a class within ninety (90) days of the filing of the complaint (A. 1a, 22a-24a), requesting the district court to certify a class pursuant to Fed. R.

Civ. P. 23(b)(2) following the completion of discovery (A. 24a). Simultaneously therewith, Gardner propounded interrogatories to Westinghouse, dealing solely with the class certification issue, to enable her to present evidence of the scope of the proposed class (A. 167a-173a). Westinghouse, which owns and operates seven (7) radio stations throughout the United States, refused to answer all interrogatories which sought information as to any radio station apart from station KDKA in Pittsburgh. (A. 26a-31a, 36a-38a, 107a, 115a) Thereupon, Gardner filed a motion to compel discovery in order to obtain complete answers to the interrogatories regarding the numbers of persons who have applied, have been hired, have been employed, and have been discharged in all of Westinghouse's radio stations (A. 2a, 162a-174a).

3. Opinion and Order of the District Court

On October 30, 1975, the Honorable Barron P. McCune held oral argument on both the motion to determine a class and

the motion to compel discovery (A. 1a, 175a-220a). By memorandum and order dated February 3, 1976, Judge McCune denied both motions. The ruling on the motion to compel discovery was the direct result of the unconditional decision to deny class certification (A. 3a, 221a, P. 40a). Denial of class status was predicated on Judge McCune's view that the requirements of Fed. R. Civ. P. 23 (a)(2), (a)(3), and (a)(4) had not been satisfied; a conclusion which he reached by comparing the nature of Gardner's individual claim on the merits with the nature of the class' substantive claims (P. 35a-39a).[4/]

4. Proceedings in the Court of Appeals

On her own behalf and on behalf of the class she sought to represent,

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4/ In sum, Judge McCune found Gardner's claim to be unique, because the facts necessary to establish it would differ from those surrounding different employment decisions in different job classifications (P. 37a-39a).

Gardner filed a notice of appeal from Judge McCune's order on February 25, 1976 (A. 3a, 222a). Westinghouse filed a motion to dismiss appeal for lack of jurisdiction, and Gardner responded (A. 3a). After initially denying Westinghouse's motion, Judges Adams and Forman of the United States Court of Appeals for the Third Circuit referred the jurisdictional question to a merits panel of the court (A. 4a).

In support of her right to maintain this appeal Gardner argued, inter alia, that the denial of class certification amounted to the effective denial of the broad injunctive relief sought on behalf of the class and, therefore, constituted an order of immediate and irreparable consequence which was appealable pursuant to 28 U.S.C. § 1292(a)(1)(1970). (R., Response to Appellee's Motion to Dismiss Appeal)

The Third Circuit rejected Gardner's argument, stating that denial of class certification does not constitute the absolute refusal of an injunction and that no immediate or irreparable consequences flow from a postponement of review (A. 223a-224a). It

accordingly granted Westinghouse's motion to dismiss the appeal on June 6, 1977 (A. 4a, 225a-226a).

Gardner timely filed a petition for rehearing which was denied on July 22, 1977. Judge Gibbons dissented and Judge Adams joined in the dissent.

The instant petition for a writ of certiorari was filed on October 14, 1977, and this Court granted the petition by order dated December 5, 1977.

VI.

SUMMARY OF ARGUMENT

The Third Circuit erred in refusing to hold that the unconditional denial of class action status in a Title VII action where a broad permanent injunction was the primary relief sought on behalf of the class was appealable as an interlocutory order refusing an injunction pursuant to 28 U.S.C. § 1292(a)(1). This Court has not ruled on the appealability of a class action order in this context, but federal appellate courts have found that the denial of class action status amounts to the refusal of an injunction.

The Third Circuit failed to recognize that the district court's denial of a class action effectively precluded the class members from obtaining any relief. The refusal of class certification stripped the case of its character as a class action.

This Court has long recognized that 28 U.S.C. § 1292(a)(1) is applicable even where a motion for an injunction has not been expressly granted or denied; the effective denial of the

injunction, which inherently has serious and irreparable consequences is the touchstone of appealability e.g., an order effectively limiting the scope of injunctive relief.

The Third Circuit erred in concluding that the class action decision is "purely procedural" for a class action determination, involving as it does a comparison of the substantive claims of the individual plaintiff with those of the class members, "touches on the merits" and finally restricts the scope of relief which the named plaintiff can ultimately obtain.

The Third Circuit ignored the danger that the postponement of review of the class denial until the conclusion of the action will work a denial of justice. If the representative plaintiff loses his or her individual claim on the merits, he or she is no longer a member of the class and thus loses his or her standing. Should the representative plaintiff succeed on the merits of the individual case and obtain all the relief requested, he or she loses the

incentive to appeal the class action decision. Unless the putative class members are aware of the status of the case and intervene in time, the putative class members may suffer a loss of the right to bring individual actions.

Immediate appealability of an erroneous class action decision fosters the policies underlying Fed. R. Civ. P. 23 and Title VII. This Court has recognized that Congress, through the 1972 amendments to Title VII, clearly indicated that Title VII actions are inherently class actions. Efficiency, and the furtherance of private enforcement of the congressional policy against discrimination are fostered by the class action device. The practical result of non-appealability is a waste of judicial time which is contrary to congressional intent.

The elements of the prima facie case and order of proof in an individual case differ from those necessary to establish a pattern or class action. Thus, the denial of a class action affects the scope of evidence both for

discovery and at trial. Ultimate reversal of a class denial will necessarily cause a remand to retry the case with a different scope of discovery and trial evidence.

The denial of a permanent injunction is as appealable under 28 U.S.C. § 1292(a)(1) as that of a preliminary injunction; the denial of a permanent injunction can be an interlocutory order.

VII.

ARGUMENT

IN AN EMPLOYMENT DISCRIMINATION ACTION INSTITUTED UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, WHERE A CLASS-WIDE PERMANENT INJUNCTION IS THE PRIMARY RELIEF SOUGHT; THE DENIAL OF A MOTION TO CERTIFY A SYSTEM-WIDE CLASS IS IMMEDIATELY APPEALABLE AS AN INTERLOCUTORY ORDER REFUSING AN INJUNCTION PURSUANT TO 28 U.S.C. § 1292(a)(1).

A. Injunctive Relief is the Heart of the Remedy Sought in the Complaint

The complaint filed in the instant action reveals that it is an "across the board" attack on all of Westinghouse's system-wide employment practices which adversely affect females. Gardner challenges hiring, assignment, promotion, and discharge policies which adversely effect women.[5] On her own

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[5] The "across the board" concept allows a person aggrieved by one aspect of an employer's discriminatory employment policies to challenge as a private attorney general all of the practices which manifest discrimination even though that person has not personally experienced all practices. Senter v. [Footnote Continued On Next Page]

behalf and on behalf of the class, Gardner seeks affirmative relief in the form of a permanent injunction to prohibit policies and practices which violate Title VII. To establish her right to such relief, Gardner alleges that she and the class have no adequate remedy at law and that a permanent injunction is the only means by which they can redress the irreparable injury which they have suffered and continue to suffer as a result of Westinghouse's actions. See p.8, supra.

In a number of cases federal appellate courts have found, particularly in civil rights actions, that injunctive relief is the primary relief sought. Jones v. Diamond, 519 F.2d 1090 (5th

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5/ (continued)
General Motors Corp., 532 F.2d 511 (6th Cir. 1976), cert. denied, 429 U.S.870 (1977); Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975); Barnett v. W. T. Grant Company, 518 F.2d 543 (4th Cir. 1975); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969).

Cir. 1975) (preliminary and permanent injunction to end violations of constitutional rights in the penal system); Yaffee v. Powers, 454 F.2d 1362 (1st Cir. 1972) (injunctive relief to end surveillance of political protesters); Brunson v. Board of Trustees of School District No. 1, 311 F.2d 107 (4th Cir. 1963), cert. denied, 373 U.S. 933 (1963) (general injunction to achieve county-wide school desegregation); compare, Williams v. Wallace Silversmiths, Inc., _____ F.2d _____, 13 E.P.D. ¶ 11,556 (2nd Cir. 1977) (Title VII case seeking primarily monetary relief); Weit v. Continental Illinois National Bank and Trust Company of Chicago, 535 F.2d 1010 (7th Cir. 1976) (antitrust class action against banks for conspiracy in setting interest rates).

The Third Circuit totally ignored the fact that Judge McCune's order denying the motion to determine a class effectively limited the system-wide injunction which was the heart of the relief sought by Gardner and which alone would have completely abolished Westinghouse's discriminatory employment practices.

B. The Denial of Class Certification Strips the Case of its Character as a Class Action

Fed. R. Civ. P. 23(c)(1) provides as follows:

> "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

The Advisory Committee notes to this aspect of Fed. R. Civ. P. 23 state that while the grant of a class action may well be conditional and altered in the future, the denial of class status clearly is not; and, upon refusal to certify, the action should be stripped of its character as a class action. Federal Rules Advisory Committee, Note to Proposed Amendments to Rule 23, 39 F.R.D. 69, 104 (1966). This court has recognized this result of the denial of class status in United Airlines, Inc. v. McDonald, _____ U.S. _____, 97 S.Ct. 2464 (1977):

> "To be sure, the case was 'stripped as its character as a class action' upon denial of certification by the District Court. [Citations omitted]" Id. 97 S.Ct. at 2469.

By its decision, the Third Circuit myopically failed to see the finality inherent in the district court's denial of class certification in the instant case.

C. 28 U.S.C. § 1292(a)(1) Applies Where an Injunction is Effectively Denied

1. This Court's Decisions Construing the Statute

The statute at issue herein, 28 U.S.C. § 1292(a)(1)(1970), had its origins in an 1891 act which established the jurisdiction of the federal appellate courts. Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955) (hereinafter "Baltimore Contractors, Inc."). In a line of cases construing the present statute and its predecessors, this Court has consistently

held that, to be appealable, an order need not expressly grant, deny or modify an injunction.[6] In General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430 (1932) (hereinafter "General Electric"), the dismissal for lack of jurisdiction of a counterclaim praying for an injunction was held appealable pursuant to the predecessor of 28 U.S.C. § 1292 (a)(1):

> ". . .But by their motion to dismiss, plaintiffs themselves brought on for hearing the very question that, among others, would have been presented to the court upon formal application for an interlocutory injunction. That is, whether the allegations of the answer are sufficient to constitute a cause of action for injunction. And the court necessarily decided upon the facts alleged in the counterclaim defendants were not entitled to an injunction. It cannot be said, indeed

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6/ This Court has similarly given a practical non-technical construction to orders appealed pursuant to 28 U.S.C. § 1291. Gillespie v. United States Steel Corp., 379 U.S. 148 (1964).

> plaintiffs do not claim, that the dismissal did not deny to defendants the protection of the injunction prayed in their answer. ..." Id. at 433 (Emphasis added)

In Enelow v. New York Life Insurance Co., 293 U.S. 379 (1935) (hereinafter "Enelow"), this court found the denial of an injunction where the district court had granted a stay of an action at law so that an equitable defense thereto could be first tried. The district court order effectively granted or refused an injunction restraining proceedings at law "precisely as if the court had acted upon a bill of complaint in a separate suit for the same purpose". Id. at 383. In 1935, in a decision compelled by the holding in Enelow, supra, this court concluded that the district court's denial of a motion for a stay of proceedings pending arbitration constituted an appealable order. Shanferoke Coal and Supply Corp. v. Westchester Service Corp., 293 U.S. 449 (1935).

In Ettelson v. Metropolitian Life Insurance Co., 317 U.S. 188 (1942) (hereinafter "Ettelson"), the district court's stay of an action at law on an insurance policy so that a counterclaim raising an equitable defense and seeking an injunction could first be tried constituted the postponement of the trial on the policy and as a practical matter terminated that action. Therefore, it was "as effective in these respects as an injunction issued by a chancellor". Id. at 192. This Court stated:

> "The relief afforded by section 129 [predecessor to present 28 U.S.C. § 1292(a)(1)] is not restricted by the terminology used. The statute looks to the substantial effect of the order made. [Citations omitted]" Id. at 192.

The opinion in Baltimore Contractors, Inc., supra, surveyed the legislative history of 28 U.S.C. § 1292(a)(1):

> "No discussion of the underlying reasons for modifying the rule of finality appears in the legislative history, although the changes seem

> plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequence. ..." Id. at 181.

It is self-evident from the above that, since the grant, denial or modification of an injunction is the essence of 28 U.S.C. § 1292(a)(1) an order granting, denying or limiting such equitable relief is inherently an order of serious, perhaps irreparable consequence.

Moreover, Baltimore Contractors, Inc., supra, does not depart from the previous cases' emphasis on the "substantial effect of the order made". Id. at 183. In an effort to define what types of order constitute the effective grant or denial of an injunction, this Court contrasted orders granting or denying equitable remedies, George v. Victor Talking Machine Co., 293 U.S. 377 (1934) (hereinafter "George"), Enelow, supra, and Ettelson, supra, with rulings which are merely steps in controlling the litigation

before the federal court. Baltimore Contractors, Inc., supra, supports the exercise of appellate jurisdiction herein, since the order denying class certification, like the orders in George, supra, Enelow, supra, and Ettelson, supra, effectively denies equitable relief. Because the appellate court's power to review this order is plainly within the letter and the spirit of 28 U.S.C. § 1292(a)(1), no judicial expansion of the statute will be required in order to hold the class denial, sub judice, a denial of an injunction.[7]

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[7] While the factual situation presented in Baltimore Contractors, Inc., supra, coupled with the technical distinction between law and equity played a significant role in this Court's decision to deny appellate jurisdiction therein, the holding does not argue against the appealability of the order at issue in this case. The precedential effect of Baltimore Contractors, Inc., supra, is limited by this Court's explicit recognition of the extent to which the precise holding is controlled by the "persistence of outmoded procedural differentiations", Id. at 184, which are not present in the case sub judice.

Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., 385 U.S. 23 (1966) (hereinafter "Switzerland Cheese") does not destory the appealability of orders which, like the class action denial in the instant case, affectively deny injunctive relief. Switzerland Cheese merely held that an order denying a motion for summary judgment on the ground that there remained a genuine issue of material fact in a case where a permanent injunction was sought did not amount to an interlocutory order refusing an injunction within the comtemplation of 28 U.S.C. § 1292(a)(1). This decision is obviously not apposite to the case sub judice, where the district court's denial of class action status prevents the putative class members from obtaining any injunctive relief whatsoever. Like General Electric, supra, Enelow, supra, and Ettelson, supra, the order complained of herein did dispose of a demand for injunctive relief. On the contrary, however, the order in Switzerland Cheese, like that in City of

Morgantown, West Virginia v. Royal Insurance Co., 337 U.S. 254 (1949) did not affect the ultimate remedy which could be obtained by the litigants but rather decided only the manner in which the case should be tried. As this Court stated in Switzerland Cheese, supra:

> ". . . the denial of a motion for a summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing--that the case should go to trial. ..." Id. at 25.

Thus, while assumption of jurisdiction in Switzerland Cheese would have required an expansion of 28 U.S.C. § 1292(a)(1), the assumption of jurisdiction over orders denying class certification in civil rights cases where

injunctive relief is sought will not.[8]

The Third Circuit engaged in an unwarranted expansion and misapplication of Switzerland Cheese by focusing on the language therein relating to pre-trial procedures and thereby failing to realize that the class action decision below finally and effectively denied injunctive relief to the members of the potential class. A class action denial in a case where injunctive relief is the primary remedy sought is not a mere pre-trial procedure.

Further, Judge McCune's decision below did "touch on the merits", and in

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8/ In Goldstein v. Cox, 396 U.S. 471 (1970), Mr. Justice Marshall limited the holding in Switzerland Cheese to its facts:

> "In Switzerland Cheese Ass'n., supra, this Court left open the question whether an order denying summary judgment might be appealable as an order denying an injunction when the ground for the denial was other than the existence of a triable issue of fact." Id. at 475 n. 2.

so doing illustrated the common practice of comparing the substantive claims of the representative plaintiff with those of the class in order to determine whether the requirements of Fed. R. Civ. P. 23(a)(2), (a)(3) and (a)(4) have been satisfied. See p.10, supra; Huff v. N. D. Cass Co. of Alabama, 485 F.2d 710 (5th Cir. 1973); Wells v. Ramsay, Scarlett and Co., 506 F.2d 436 (5th Cir. 1974); Long v. Sapp, 502 F.2d 34 (5th Cir. 1974). The determination of whether or not a case should proceed as a class action often implicates the merits of the underlying cause of action. Lamphere v. Brown University, 553 F.2d 714 (1st Cir. 1977).9/

9/ However, courts which rely on the overlap between the aspects of Fed. R. Civ. P. 23 and the merits of the substantive case in justifying their refusal to certify class actions often violate Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 177-178 (1974).

The order sought to be appealed in this case thus falls squarely within the perimeter of 28 U.S.C. § 1292(a)(1) and the cases interpreting the statute in this Court, and no judicial expansion of the statute would result.

D. The Order Denying Class Certification in a Title VII Case Where Broad Injunctive Relief is Sought Effectively Limits the Scope of the Injunction Which Can Ultimately be Granted, and Constitutes the Denial of That Injunction.

1. The Unconditional Denial of Class Certification Eliminated the Broad Injunctive Relief Sought

When a district court refuses to certify a case as a class action, that decision strips the case of its character as a class action. Fed. R. Civ. P. 23(c)(1); United Airlines, Inc. v. McDonald, supra; Federal Rules Advisory Committee, Note to Proposed Amendments to Rule 23, supra. The district court's order herein was unconditional in language and repudiated the "across the board" concept which Gardner espoused in

her complaint and in her briefs and argument before the lower court. Combined with the denial of the motion to compel discovery, the failure to grant class certification foreclosed Gardner from obtaining through discovery and presenting at trial any evidence of Westinghouse's employment practices, except as they relate to Gardner's individual case. See p.53-54, infra. Therefore, it will be impossible for Gardner to prepare the record for any injunctive relief which will benefit any female except Gardner. See e.g., Rich v. Martin Marietta Corp., supra; Brunson v. Board of Trustees of School District No. 1, supra.

2. The Scope of Relief Which Can be Obtained After Class Certification is Denied is Limited to That Which Will Remedy the Title VII Violation for Gardner Alone

Absent compliance with Fed. R. Civ. P. 23 and certification thereunder, the individual plaintiff can obtain no greater relief than that to which he or she is individually entitled. Sperry Rand Corp. v. Larson, 554 F.2d 868 (8th

Cir. 1977); Carracter v. Morgan, 491 F.2d 458 (4th Cir. 1973); Washington v. Safeway Corp., 467 F.2d 945 (10th Cir. 1972); Danner v. Phillips Petroleum Co., 447 F.2d 159 (5th Cir. 1971); see also, Equal Employment Opportunity Commission v. D. H. Holmes Company, Ltd., 556 F.2d 787 (5th Cir. 1977). This Court's recent discussion of the evidence to be presented during the remedial phase of a Title VII case, International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977), and its discussion of the requirements of Fed. R. Civ. P. 23 in East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977); support the concept that a court's power to award broad class-wide "make whole" relief under Section 706 of Title VII, 42 U.S.C. § 2000e-5 can be exercised only to the extent that the proper predicate is established by the

plaintiff(s) and a proper class action is established.[10]

10/ Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir. 1971) (herein after "Sprogis") is not to the contrary. The instant case does not involve a company-wide rule or policy where relief granted in favor of the named plaintiff will perforce operate to the benefit of the class, such as would result if a "no marriage" rule or preemployment testing procedure was at issue. The essence of the "across the board" class action is that a permeating policy of discrimination pervades employment decisions which may and do involve different factual complexes. Senter v. General Motors Corp., supra; Johnson v. Georgia Highway Express, Inc., supra.

Even in Sprogis, supra, a case challenging a "no marriage" rule, Mr. Justice Stevens stated as follows:

> "Nor can I find any basis in Rule 23 of the Federal Rules of Civil Procedure for permitting an individual claim to be converted into a class action after a decision

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Since the order refusing to certify a class action in the case sub judice finally and effectively denied the injunctive relief to the putative class members and effectively limited the injunctive

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10/ (continued)
on the merits. . . At a minimum, this rule [i.e., Fed. R. Civ. P. 23(c)(1)] requires the class to be defined before the merits of the case have been decided. This requirement is, of course, of special importance in litigation involving claims for damages or back pay. A procedure which permits a claim to be treated as a class action if plaintiff wins, but merely as an individual claim if plaintiff loses, is strikingly unfair." Id. at 1207.

Thus the district court's authority pursuant to 42 U.S.C. § 2000e-5 to grant such relief as is necessary to eradicate discrimination is limited by the procedural rules, especially by Fed. R. Civ. P. 23.

relief which Gardner herself can eventually obtain, it is appealable under 28 U.S.C. § 1292(a)(1). See, Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737 (1976).

3. Four Circuits Within the Federal Appellate System Have Expressly Held That Orders Denying Action Certification Are Appealable in Civil Rights Actions.

Four circuits within the federal appellate system have explicitly recognized that an appeal lies from an order denying class action status in a civil rights case where such decision effectively limits the scope of the broad injunctive relief sought. Yaffee v. Powers, supra; Doctor v. Seaboard Coastline Railroad Co., 540 F.2d 699 (4th Cir. 1976); Brunson v. Board of Trustees of School District No. 1, supra; Jones v. Diamond, supra; Roberts v. Golden Gate Disposal Co., 556 F.2d 588 (9th Cir. 1977), cert. denied,

sub. nom. Roberts v. Sunset Scavenger Co., 46 U.S.L.W. 3219 (1977); Gay v. Waiters' and Dairy Lunchmens' Union Local No.30, 549 F.2d 1330 (9th Cir. 1977); Inmates of San Diego County Jail v. Duffy, 528 F.2d 954 (9th Cir. 1975); Price v. Lucky Stores, Inc., 501 F.2d 1177 (9th Cir. 1974).[11/]

The Seventh Circuit will review appeals from an order denying class action status where the order is issued in conjunction with the ruling on a preliminary injunction. Jenkins v. Blue Cross Mutual Hospital Insurance Co., 538 F.2d 164 (7th Cir. 1976), cert. denied, 429 U.S. 986 (1976).

11/ The Eighth Circuit has expressly refused to adopt or reject this theory of appealability for class action orders. Johnson v. Nekoosa-Edwards Paper Co., ____ F.2d ____, 14 FEP Cases 1658 (8th Cir. 1977); Donaldson v. Pillsbury Co., 529 F.2d 979 (8th Cir. 1976).

The courts of appeals which have held that orders refusing to certify class actions in civil rights cases are appealable understand, as the Third Circuit did not, that such orders effectively, finally, and totally deny or narrow considerably the scope of any injunctive relief which the named plaintiff could ultimately obtain if he or she succeeds on the merits. Yaffee v. Powers, supra.[12/]

12/ The Second and District of Columbia Circuits in addition to the Third Circuit have refused to allow appeals from class action denials in employment discrimination actions. Williams v. Wallace Silversmiths, Inc., supra; Williams v. Mumford, 511 F.2d 363 (D.C. Cir. 1975), cert. denied, 423 U.S. 828 (1975).

The former case is distinguishable on the grounds that the Second Circuit found that injunctive relief was not the heart of the relief sought. Williams v. Mumford, supra, narrowly construes Switzerland Cheese supra, as did the Third Circuit.

However, on application for rehearing before the court in banc, Judge Spottswood W. Robinson of the
[Footnote Continued on Next Page]

The theory which emerges from the above cases is that where the substantial effect of the court's order denying class action status "is to narrow considerably the scope of any possible injunctive relief in the event plaintiffs ultimately prevail on the merits . . . the order is appealable as a denial of the broad injunctive relief sought. ..." Yaffee v. Powers, supra at 1364.[13/]

12/ (continued)
District of Columbia Circuit offered a strong statement of dissent on his own behalf and on behalf of three other judges. The dissent recognized the central importance of the class action and the chilling effect which nonappealability of class action denials, save in limited circumstances, will have on the continued viability of Fed. R. Civ. P. 23.

13/ At the time the instant appeal was filed in February,1976, the Third Circuit apparently followed the line of cases upholding appealability. Hackett v. General Host Corp., 455 F.2d 618 (3rd Cir. 1972).
[Footnote Continued on Next Page]

The Fourth Circuit delineated the conditions under which a denial of class

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13/ The Third Circuit deliberately closed this avenue of appeal in its opinion below (P.4a-5a).

Since the Third Circuit had also consistently held that the denial of class certification is not appealable as a final order under either the collateral order or "death knell" doctrines, Hackett v. General Host. Corp., supra, Gardner accordingly filed her notice of appeal pursuant to 28 U.S.C. § 1292(a)(1).

However, should the order refusing class certification be deemed unappealable under 28 U.S.C. § 1292 (a)(1), it is respectfully requested that this Court consider the appealability of the order pursuant to 28 U.S.C. § 1292(a)(1) See, Liberty Mutual Insurance Co. v. Wetzel, supra; Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); Gillespie v. U.S. Steel Corp., supra; Livesay v. Punta Gorda Isles, Inc., 550 F.2d 1106 (8th Cir. 1977), cert. granted, 46 U.S.L.W. 3145 (1977)

action certification will be appealable pursuant to 28 U.S.C. § 1292(a)(1), i.e., where the "class action bears a symbiotic relationship to the frustration of relief . . ." Jones v. Diamond, supra at 1095:

> "The first, and perhaps obvious, requirement is that the plaintiff's prayer for an injunction must constitute the heart of the relief he seeks. The desired injunction must be capable of resolving the substantive issues of the claim; it cannot merely maintain the status quo during the litigation. . . . [citations omitted]
>
> "The second requirement for appealability is that the practical result of the order denying the proposed class must be to deny the requested broad injunction. . . .
>
> We therefore hold that where the denial of permission to proceed as a class is synonymous with the denial of the broad injunctive relief sought on the merits, and where the injunction is the primary purpose of the suit, the order is appealable under section 1292(a)(1) as an order 'refusing' an injunction."

Id. at 1095-1097 (Emphasis added)

In cases where injunctive relief is requested, orders other than those dealing with class action certification have been held appealable under 28 U.S.C. § 1292(a)(1) on the theory that they have the effect of limiting injunctive relief: Melindez v. Singer Friden Corp., 529 F.2d 321 (10th Cir. 1976) (dismissal by summary judgment of Title VII claim limiting plaintiff to relief under 42 U.S.C. § 1981); Scarrella v. Midwest Federal Savings and Loan, 536 F.2d 1207 (8th Cir. 1976), cert. denied, 429 U.S. 885 (1976) (dismissal of parties); Martinez v. Mathews, 544 F.2d 1233 (5th Cir. 1976) (order that an interim policy board be elected); Abercrombe & Fitch Co. v. Hunting World, Inc., 461 F.2d 1040 (2nd Cir. 1972) (partial grant of summary judgment in trademark infringement action requesting injunction against all uses of the word "safari"); Build of Buffalo, Inc. v. Sedita, 441 F.2d 284 (2nd Cir. 1971) (dismissal of several defendants in an action seeking to end unconstitutional, systematic pattern of abusive police practices); Spangler v. U.S.,

415 F.2d 1242 (9th Cir. 1969) (order striking allegations in United States' complaint in intervention seeking school desegregation in units of the school system other than those attended by the original individual plaintiffs).

The Third Circuit refused to follow substantial judicial authority which, in considering the appealability of orders effectively denying or limiting injunctive relief, held that those orders are immediately appealable as interlocutory orders refusing injunctions.

E. The Denial Of Class Certification Is Inherently An Order Of Serious And Irreparable Consequence.

The Third Circuit, in focusing on whether the "delay in review will work an injustice" (P. 6a; Court's emphasis) applied one prong of the balancing test which this Court has utilized in determining whether a marginally final order can be appealed pursuant to 28 U.S.C. § 1291. Gillespie v. United States Steel Corp., supra; Dickenson v. Petroleum Conversion Corp., 338 U.S. 507 (1950). However, it is the purpose of 28 U.S.C. § 1292(a)(1) to allow interlocutory appeals where an order of

serious and irreparable consequence; i.e., an injunction, has been granted, denied, or modified.[14] It is the inherent and immediate irreparable effect of that order which, Congress recognized, provides the necessity for an appeal without delay. Baltimore Contractors, Inc., supra. Gardner and the class premised their demand for a permanent injunction on the inadequacy of legal remedies to arrest the irreparable harm they suffer as a result of Westinghouse's employment practices. An analysis of the consequences of a delay in review until final judgment therefore has no applicability to a case properly appealed pursuant to 28 U.S.C. § 1292 (a)(1).

Nonetheless, it is important to note the consequences of the failure to certify a class action in an employment discrimination action, for to do so

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14/ The presence of irreparable harm because of the inadequacy of legal remedy is of course, the sine qua non of an injunction. O'Shea v. Littleton, 414 U.S. 488 (1974); Younger v. Harris, 401 U.S. 37 (1971).

underscores the importance of the interlocutory appeal in these cases. Not only did the Third Circuit refuse to see the denial of class status for what it was; the final denial of a permanent injunction, but it also refused to analyze the crucial effect of the district court's order on the future conduct of the case.

1. Standing and Lack of Incentive to Appeal

Where a class action is not certified and subsequently the representative plaintiff loses his or her individual Title VII claim on the merits, this Court's recent decision in East Texas Motor Freight System, Inc. v. Rodriguez, supra suggests that no class could subsequently be certified, at least at the behest of the original class representative, despite the presence of a wholly erroneous district court decision on the maintainability of the case as a class action. Since the representative plaintiff must be a member of the class he or she seeks to represent at the time of certification,

the failure of the individual claim would be dispositive. Moreover, it is probable that an appeal challenging the merits of a district court order denying class certification brought by the class representative following the loss of his or her individual case would be dismissed as not presenting the appellate court with a concrete case or controversy in violation of Article III of the Constitution of the United States. See, East Texas Motor Freight System, Inc. v. Rodriguez, supra; Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); Sosna v. Iowa, 419 U.S. 392 (1975); Board of School Commissioners of the City of Indianapolis v. Jacobs, 420 U.S. 128 (1975); Pasadena Board of Education v. Spangler, 427 U.S. 424 (1976); Accord, Napier v. Gertrude, 542 F.2d 825 (8th Cir. 1976); Contra, Satterwhite v. City of Greenville Texas, 557 F.2d 414, (5th Cir. 1977), reh. granted, 563 F.2d 147 (5th Cir. 1977).[15/]

15/ The dissenting opinion filed in Satterwhite, supra, indicates that the panel opinion may well contravene this court's decision in East Texas Motor Freight System, Inc. v. Rodriguez, supra.

The denial of an immediate appeal from the refusal to certify a class action may well foreclose an appeal on the merits of that decision at any time. Should an appeal be allowed, it may result in an empty victory for the putative class where only a single representative has brought the action and that representative cannot subsequently be certified as the class representative because of the loss of the individual case.

Under United Airlines, Inc. v. McDonald, supra, and American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) the Title VII statute of limitations will be tolled for putative class members at most until an appellate court has reviewed the lower court's decision on class certification. Individuals who are unaware of the precise moment when the appellate process concludes will not have exhausted their administrative remedies, and they will therefore be unable to institute another class action or individual actions should an appellate

court uphold the district court's denial of class certification. While a class member in a Title VII suit need not exhaust administrative remedies, the class representative or plaintiff in an individual action clearly must do so prior to instituting the action. Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968). Ignorance of the status of the class action and failure to exhaust administrative remedies will result in the loss of the right to litigate many potential claims.

Moreover, if the representative plaintiff succeeds on the merits after the district court denies class certification and obtains all of the relief to which he or she is entitled; he or she will, undoubtedly, have no incentive to appeal the class action decision because the reversal of class determination will inevitably lead to a new trial of the action with a different scope of evidence and discovery. Anschul v. Sitmar Cruises, Inc., 544 F.2d 1364 (7th Cir. 1976), cert. denied, 429 U.S. 907 (1976) (dissenting opinion); See, e.g., McDonald

Douglas Corp. v. Green, 411 U.S. 792 (1973); International Brotherhood of Teamsters v. U.S., supra.

While the putative class members could attempt to intervene to appeal the refusal to certify the class, United Airlines, Inc. v. McDonald, supra, such intervention would be rare due to lack of knowledge that a class action had been instituted and lack of awareness of the progress of the litigation. In the case at bar, potential class members residing in cities other than Pittsburgh will have virtually no opportunity to learn of the status of the action. Should Gardner have proceeded directly to a trial on the merits of her individual case instead of filing this appeal, and should she obtain satisfactory relief and choose not to appeal the class action determination; it is extremely probable that Judge McCune's decision will never be reviewed to the detriment of the putative class.

2. Public Policy Underlying Title VII and Fed. R. Civ. P. 23

The class action decision which is

clearly fundamental to the future conduct of any action has a special importance in the Title VII case. The Advisory Committee Notes to Fed. R. Civ. P. 23(b)(2) indicate that the subsection was intended to reach situations:

> "where a party has taken action or refused to take action with respect to a class and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. ...
>
> Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. ..." Federal Rules Advisory Committee, Notes to Proposed Amendments to Rule 23, supra at 102.

In enacting the 1972 Amendments to Title VII, Congress was keenly aware of the development of the use of the class action in the courts. In providing for private enforcement under Section 706, 42 U.S.C. § 2000e-5, Congress

did not intend that the class action device should be affected. As the House report read into the Congressional Record during the debate on the 1972 Amendments stated:

> "The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that many Title VII claims are necessarily class action complaints and that, accordingly, it is not necessary that each individual entitled to relief be named in the original charge or in the claim for relief. ..."
> 118 Cong. Rec. 7565 (1972) (Emphasis added) 16/

16/ In East Texas Motor Freight System, Inc. v. Rodriguez, supra, the Court indicated its awareness that "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving class wide wrongs. ..." Id. at 405.

This Court relied on the above legislative history in Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 n.8 (1975), in broadly construing the remedial provisions of Title VII in class action cases.

Where class certification in Title VII cases is capriciously denied as a result of district court inhospitability to the device and to Title VII, Congressional policy is violated. There is an urgent need for appellate court supervision of class action determinations. The nonappealability of class action denials will, as Judge Robinson recognized, have a chilling effect on the class action. Williams v. Mumford, supra (dissenting opinion by Robinson, J.). In view of the inextricable interweaving of Title VII and Fed. R. Civ. P. 23, nonappealability under § 1292(a)(1) will have a synergistic chilling effect on Title VII rights.

3. Expense Resulting From the Differing Elements of Proof in Title VII Individual and Class Actions.

In considering whether to allow

piecemeal review of marginally final orders, this Court has given weight to the expense attendant upon the decision not to allow an appeal from an order which is fundamental to the further conduct of a case. U.S. v. General Motors Corp., 323 U.S. 373 (1945); See, Baltimore Contractors, Inc., supra (dissenting opinion by Black, J.).

The scope of evidence and the elements of the burden of proof in an individual action under Title VII differ markedly from those in a pattern and practice or class action thereunder. Compare, McDonald Douglas Corp. v. Green, supra; Franks v. Bowman Transportation Co., supra; International Brotherhood of Teamsters v. United States, supra. When class action status is denied, the focus of the substantive case shifts to an emphasis on the individual plaintiff's claim on the merits. If an appellate court finds the class action decision to be erroneous after the individual case has been concluded, reversal of the class action will necessitate a retrial of the substantive case

following an additional period for discovery on the class claims. See e.g., Rich v. Martin Marietta Corp., supra. The unavailability of an immediate appeal will result in an inordinate waste of time by the already overburdened district courts, will escalate the expense of litigation, and will seriously undermine the policy behind Fed. R. Civ. P. 23, i.e., to promote the efficient administration of federal actions. An interlocutory appeal of the order denying class action status will facilitate the ultimate termination of the action on the merits.

Thus, were this Court to balance the competing considerations which it has identified in ruling on appeals brought pursuant to 28 U.S.C. § 1291, Gillespie v. United States Steel Corp., supra, it is evident that in the instant case the danger of denying justice by delay far outweights the inconvenience of interlocutory review. This is especially true herein because substantive rights can well be lost, Congressional policy will be contravened, and review may be totally foreclosed should

Gardner not prevail in her individual case. The Third Circuit erred in failing to consider the consequences of the nonappealability of Judge McCune's order.

F. 28 U.S.C. § 1292(a)(1) Encompasses Orders Effectively Denying Permanent Injunctive Relief

The absence of a request for a preliminary injunction in the complaint filed in this case does not defeat appealability pursuant to 28 U.S.C. § 1292(a)(1). Interlocutory orders can encompass denials of permanent injunctions.17/

In Baltimore Contractors, Inc., supra, this Court noted the absence of legislative history on the Evarts Act, the predecessor of the present 28 U.S.C. § 1292(a)(1). However, the statute, since its enactment in 1891 and throughout subsequent revisions in language,

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17/ Contrast this with the language of 28 U.S.C. § 1253 as construed in Goldstein v. Cox, supra, which statute contained language limiting this Court's interlocutory appellate jurisdiction to preliminary injunction orders.

has always referred simply to injunctions and has never specified either permanent or preliminary injunctions.

This Court has consistently held the grant or denial of a permanent injunction to be appealable. In John Simmons Co. v. Grier Brothers Co., 258 U.S. 82 (1922), the Court held:

> "...But an examination of the record demonstrates that they correctly described the decree as interlocutory.
>
> "The decree of July 24, 1914, although following a 'final hearing', was not a final decree. It granted to plaintiffs a permanent injunction upon both grounds, but an accounting was necessary to bring the suit to a conclusion upon the merits. An appeal taken to the Circuit Court of Appeals, whose jurisdiction, under Section 129, Judicial Code (Comp. St. § 1121), extended to the revision of interlocutory decrees granting injunctions, followed by the decision of that court reversing in part and affirming in part, did not result in a decree more final than the one reviewed. ..." Id. at 89.[18]

18/ However, noting that the appeal had not been timely taken this Court dismissed it.

In George supra, a decree granting an injunction against patent infringement and appointing a special master to make an accounting was found to be appealable.

In Switzerland Cheese, supra, this Court stated that an interlocutory order could embrace the denial of a permanent injunction.

Most recently, in Liberty Mutual Insurance Co. v. Wetzel, supra, Mr. Justice Rehnquist held, in a case where, like the instant case, relief was sought enjoining discriminatory employment practices, that the grant of such an injunction would have been appealable pursuant to 28 U.S.C. §1292(a)(1). The Wetzel decision has been cited and followed by United States Court of Appeals for the Fifth Circuit in McGill v. Parsons, 532 F.2d 484, 485 (5th Cir. 1976) at n. 1. Other circuits have also expressly found the denial of a permanent injunction to be an appealable interlocutory orders pursuant to 28 U.S.C. §1292(a)(1). Reed v. Rhodes, 549

F.2d 1050 (6th Cir. 1976); Equal Employment Opportunity Commission v. International Longshoremen's Association, 511 F.2d 273 (5th Cir. 1975); Fidelity Trust Co. v. Board of Education of City of Chicago, 174 F.2d 642 (7th Cir. 1949).

VIII.

CONCLUSION

Based upon the foregoing reasons and authorities, it is respectfully prayed that this Honorable Court reverse or vacate the judgment of the United States Court of Appeals for the Third Circuit, and remand this case to the said Court with directions to decide the appeal on its merits.

Respectfully submitted,

ROBERT N. HACKETT

JOAN P. FELDMAN

BASKIN, BOREMAN, WILNER,
SACHS, GONDELMAN & CRAIG
10th Floor Frick Building
Pittsburgh, PA 15219

Counsel for Petitioner,
Jo Ann Evans Gardner

APPENDIX TO BRIEF

Rule 23. Class Actions.

(a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action To Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall

include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the

class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on interveners; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-560

JO ANN EVANS GARDNER,
Petitioner
v.
WESTINGHOUSE BROADCASTING COMPANY,
Respondent
On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT

LEONARD L. SCHEINHOLTZ
WALTER P. DEFOREST
PETER D. POST
KEVIN P. LUCAS
JEFF L. LEWIN
REED SMITH SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania 15219

WENDELL G. FREELAND
RICHARD F. KRONZ
JOSEPH F. GROCHMAL
FREELAND & KRONZ
409 Plaza Building
Pittsburgh, Pennsylvania 15219

Counsel for Respondent
Westinghouse Broadcasting Company

Of Counsel:

STUART I. SALTMAN
Westinghouse Electric Corporation
Gateway Center
Pittsburgh, Pennsylvania 15222

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

INDEX

CITATIONS

Miscellaneous.

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The unreported Memorandum Opinion and Order of the District Court For the Western District of Pennsylvania is printed in Appendix B to the Petition For Certiorari. (P. 34a-40a).[1] The opinion of the United States Court of Appeals for the Third Circuit (P. 2a-21a) and the opinion sur denial of rehearing en banc P. 22a-33a) are reported at 559 F.2d 209.

1. "P." refers to the Appendix to the Petition for Certiorari. "A." refers to the Appendix to Petitioner's Brief.

STATUTES INVOLVED

This case involves the interpretation and application of 28 U.S.C. § 1292(a)(1) which provides:

> (a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court . . . .

In particular, this case involves the question of appealability under 28 U.S.C. § 1292(a)(1) of an order denying certification of a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, 28 U.S.C. Fed.R.Civ.P. 23, which is set forth in Addendum A to this Brief. Also relevant to the Court's consideration of this case are the following statutes:

(1) 28 U.S.C. § 1291:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

(2) 28 U.S.C. § 1292(b):

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(3) The All Writs Act, 28 U.S.C. § 1651(a):

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

QUESTION PRESENTED

Is the denial of class certification immediately appealable under 28 U.S.C. § 1292(a)(1) as an interlocutory order refusing an injunction where no application for a preliminary injunction was ever made and preliminary injunctive relief was not even requested in the Complaint?

STATEMENT OF THE CASE

In January, 1972 Petitioner, Jo Ann Evans Gardner, applied for the position of talk show host at KDKA-Radio in Pittsburgh, Pennsylvania. This radio station is a subsidiary of Respondent, Westinghouse Broadcasting Company.[2] The record shows that Petitioner had no previous training or employment experience in broadcasting. (A. 122a-134a). Petitioner was not hired by KDKA-Radio.

Petitioner's charge of sex discrimination in employment which was filed with the Equal Employment Opportunity Commission ("EEOC") on April 19, 1972 listed only KDKA-Radio and not Respondent as the discriminating employer (A. 16a) On April 7, 1975 the EEOC sent Petitioner a notice of her right to institute suit. (A. 13a).

On May 20, 1975, more than three years after she had been denied employment, Petitioner filed this law-

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2. Respondent owns nine radio and five television stations throughout the United States, including the radio station known as KDKA-Radio and a television station known as KDKA-TV in Pittsburgh, Pennsylvania.

suit in the United States District Court for the Western District of Pennsylvania alleging violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (Supp. 1975). Petitioner's Complaint claimed "broad-based" sex discrimination in all of the operations of Westinghouse Broadcasting Company and sought relief for Petitioner[3] and for members of a class she wished to represent. Particularly, she requested a permanent injunction against sex discrimination, back pay, money damages, other appropriate relief and counsel fees. (A. 14a-15a). Petitioner did not then, nor has she ever, sought a preliminary injunction for herself or for the class generally pursuant to Fed.R.Civ.P. 65.

Petitioner filed a "Motion to Determine a Class Action" on July 9, 1975. The District Court allowed discovery regarding the question of class action status and, following a hearing, Petitioner's motion was denied in a memorandum opinion and order dated February 4, 1976. (P. 34a-40a). The District Court specifically found that Petitioner did not meet the standards of Fed.R. Civ.P. 23(a)(2), (a)(3) and (a)(4) requiring common questions of law and fact, typicality and fair and adequate protection of the putative class. (P. 38a-39a).

Without seeking or obtaining a certificate from the District Court pursuant to 28 U.S.C. § 1292(b), Petitioner filed an appeal with the Court of Appeals for the Third Circuit. She asserted that the Court of Appeals had jurisdiction under 28 U.S.C. § 1292(a)(1).

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3. In Petitioner's answer to Interrogatories to Plaintiff, No. 4, she stated her primary reason for bringing the suit was to secure employment for herself. (A. 121a).

Respondent's motion that the Third Circuit dismiss the appeal for lack of jurisdiction was granted in an opinion and judgment order dated June 6, 1977. The opinion is reported as *Gardner v. Westinghouse Broadcasting Co.*, 559 F.2d 209 (3rd Cir. 1977).

On December 5, 1977, this Court granted the petition for a writ of certiorari and directed that this case be heard in tandem with *Coopers & Lybrand v. Cecil Livesay and Dorothy Livesay* and *Punta Gorda Isles, Inc., et al. v. Cecil Livesay and Dorothy Livesay,* filed at No. 77-1836 and No. 77-1837, respectively.

SUMMARY OF ARGUMENT

The instant case presents the fundamental issue whether a district court's order denying class action status in a lawsuit seeking permanent, but not preliminary, injunctive relief is immediately appealable under 28 U.S.C. § 1292(a)(1) as an interlocutory order refusing an injunction.

This Court repeatedly has recognized that the final judgment rule enacted by Congress lies at the foundation of the federal system of appellate review. The non-appealability of interlocutory trial court orders protects litigants against the costs and burdens of piecemeal appeals, avoids disruption and delay of trial court proceedings and prevents the inundation of already overworked appellate courts by a stream of appeals from non-final orders.

Congress enacted § 1292(a)(1) as a limited exception to the final judgment rule in order to ensure immediate review of non-final injunctive orders of "serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176, 181 (1955). Immediate appeal as of right is thus provided in § 1292(a)(1) to protect litigants against an erroneous injunctive order which has a direct, immediate and irreparable impact on the merits of the controversy that an appellate court might be unable to remedy if review were delayed until final judgment. To be appealable under this provision, an order must actually grant or deny an injunction at the time it is rendered.

An order refusing to certify a class in a purported class action is not a denial of injunctive relief. In denying class certification, a district court does not rule on

the entitlement of the class to injunctive relief. Rather, the class certification decision involves a determination of whether the putative class exists and whether the named plaintiff is a proper representative thereof. A denial of class action status has no direct consequences on the merits of the dispute but is simply a procedural order which results in the litigation proceeding to trial as an individual action.

Furthermore, an order denying class certification does not necessarily limit the scope of any injunction which might eventually be granted. The trial court may later decide to certify the class or permit intervention by members of the putative class, or it may grant injunctive relief that would benefit all members of the putative class. Moreover, unlike a grant or refusal of preliminary injunctive relief which is immediately reviewable under § 1292(a)(1), an erroneous denial of class certification may be adequately reviewed after judgment on the merits under 28 U.S.C. § 1291. Finally, immediate review of an adverse class determination is available in appropriate circumstances under 28 U.S.C. § 1292(b) or by writ of mandamus.

Thus, an order denying class action status is not a refusal of an injunction, and the Third Circuit properly ruled that it had no jurisdiction to hear this appeal under § 1292(a)(1).

ARGUMENT

I. There Is a Strong and Well Justified Policy in Favor of the Final Judgment Rule of Appealability.

Petitioner contends that she may, as a matter of right, appeal from a denial of class certification merely because she included a request for a permanent injunction in her prayer for relief. An analysis of the policies underlying the final judgment rule is helpful to an understanding of why Petitioner's contention is without merit.

The final judgment rule has always been the "dominant rule" in federal appellate practice. *DiBella v. United States,* 369 U.S. 121, 126 (1962). This Court repeatedly has stressed that "there has been a firm Congressional policy against interlocutory or 'piecemeal' appeals and courts have consistently given effect to that policy." *Abney v. United States,* 431 U.S. 651, 656 (1977). *Accord, Goldstein v. Cox,* 396 U.S. 471, 478 (1970); *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176, 178 (1955).

Adherence to the rule of finality avoids the delay and expense caused by piecemeal litigation. *Catlin v. United States,* 324 U.S. 229, 234 (1945).[4] Avoidance of delay is crucial because "[t]o be effective, judicial administration must not be leadenfooted." *Cobbledick v. United States,* 309 U.S. 323, 325 (1940).

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4. Such delay has been characterized as an unqualified evil which causes an increase in settlement pressures and an improvement in the bargaining position of undeserving litigants. Carrington, *Crowded Dockets and the Court of Appeals: The Threat to the Function of Review and the National Law,* 82 Harv. L. Rev. 542, 554 (1969).

The final judgment rule also prevents the disruption of orderly trial proceedings by discouraging "undue litigiousness." *DiBella, supra,* 369 U.S. at 124. In this manner, the final judgment rule protects litigants from the "harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." *Cobbledick, supra,* 309 U.S. at 325.

In addition to protecting litigants from the expenses and delay of piecemeal appeals, the finality principle protects the integrity and viability of the federal court system. "It is the means for achieving a healthy legal system." *Cobbledick, supra,* 309 U.S. at 326. The final judgment rule provides a means by which appellate courts can more knowledgeably exercise their review function. Interlocutory appeals force appellate courts to review trial court proceedings with which they are unfamiliar on the basis of an incomplete record. Sometimes even different panels of the same court may be required to perform that function on separate interlocutory appeals. Appellate review after the entry of final judgment provides a single panel with the means of making a fully informed review of the proceedings before the trial court. "The opportunity given the reviewing court to view the entire controversy with the perspective the completed proceedings provides enhances the likelihood of sound review." *Parkinson v. April Industries, Inc.,* 520 F.2d 650, 652 (2d Cir. 1975).

In addition, the final judgment rule helps preserve a healthy legal system by maintaining the appropriate relationship between appellate and district courts. A refusal to allow interlocutory appeals enables a trial court to control the litigation before it and prevents unwarranted appellate court interference in trial court proceedings. *Parkinson, supra,* 520 F.2d at 652. Increased appellate court involvement in proceedings at the district court level caused by interlocutory appeals is a matter of serious concern. It has been suggested that such interference causes litigants and the public to lose respect for, and confidence in, the capabilities of federal district judges.[5]

The final judgment rule provides a sound means of preserving a healthy legal system. Such a rule limits the absolute number of appeals in the federal court system. The conservation of judicial resources and energy is an important benefit derived from the limitation on the number of appeals imposed by the final judgment rule. Furthermore, such a limitation on appeals is crucial because it ensures that appellate deliberations will be characterized by quality and not quantity.

Petitioner now seeks to erode the final judgment rule despite its long history and proven wisdom. Her attack comes at a time when the sheer number of cases presented for appellate review attracts the concern of the judiciary, the bar and the general public.

A study prepared under the auspices of the American Bar Foundation in collaboration with the Appellate Judges' Conference has suggested that increased conges-

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5. Professor Wright has noted:

> "[I]ncreased review is likely to lead to quite tangible public dissatisfaction. Every time a trial judge is reversed, every time the belief is reiterated that appellate courts are better qualified than trial judges to decide what justice requires, the confidence of litigants and the public in the trial courts will be further impaired." Wright, *The Doubtful Omniscience of Appellate Courts,* 41 Minn. L. Rev. 751, 781 (1957).

tion at an appellate court level threatens the effectiveness of review, as follows:

> "As time passes the backlogs grow, playing havoc with the performance of all appellate judicial functions. Every purpose served by the appellate judicial process is frustrated by the resulting delay in rendering decisions: justice between litigants is defeated; guidance to the citizenry, the bar, and the lower courts is unavailable; development of the law is slowed. Hasty decision on appeals, on the other hand, can produce similar consequences: there is less assurance that the parties will receive justice, and the quality of growth in the law will be lowered. When dockets become crowded, there is an inevitable conflict between volume and quality." R. Leflar, Internal Operating Procedures of Appellate Courts 9 (1976).

Such demands on limited appellate resources threaten to transform appellate review from an informed deliberation into a "processing" procedure.[6]

The current workload in the federal court system has already become sufficiently burdensome that the potential threat to the effectiveness of appellate review should not be ignored.[7]

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6. It has been suggested that an increasing workload poses a similar threat to the historic and essential functions of this Court. Federal Judicial Center's *Report of Study Group on the Caseload of the Supreme Court,* 57 F.R.D. 573 (1972).

7. The following discussion of the workload of the federal court system is made in terms of percentage rates of change rather than absolute figures. This was done in an attempt to provide a view of trends in the federal court system. Citations are made with reference to the location of the absolute figures upon which the rate of change computations were made.

At the district court level, the number of civil cases filed during the 1977 fiscal year is 111.2% greater than the number of civil cases filed in 1962.[8] The number of civil cases pending has increased at an even greater rate. For the same time period (1962-77), the number of civil cases pending has increased by 126.0%.[9]

The number of class actions pending at the district court level has doubled in the five-year period since 1972.[10] Class actions[11] place a more significant burden on the federal court system and litigants than is indicated solely by an examination of the mere number of such lawsuits.[12] The federal judicial system's difficulty

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8. 1977 Annual Report of the Director of the Administrative Office of the United States Courts 80. Such reports are hereinafter cited as Annual Report preceded by the year.

9. *Id.*

10. 1977 Annual Report 121; 1973 Annual Report 177. The Administrative Office of the United States Courts does not provide data concerning class actions at the appellate court level. Information concerning such actions at the district court level is available and would appear to be an accurate indication of workload trends confronted by the courts of appeals.

11. Employment discrimination suits constituted 34.6% of the total number of civil class actions filed during the 1976 and 1977 fiscal years. 1977 Annual Report 126.

12. Since 1975, pending class actions have constituted 4.3% of all pending civil cases. 1977 Annual Report 121. This figure understates the strain on judicial resources imposed by class actions. For example, in a study of antitrust class action suits, it was found that class actions tend to pend longer, involve considerably more discovery, and accumulate 1.6 times the number of docket entries per day of pendency. DuVal, *The Class Action As An Antitrust Device: The Chicago Experience, (I),* 1976 A.B.F. Res.J. 1023, 1041-42 (1976).

in handling that burden is demonstrated by the fact that pending class actions at the district court level have increased at a rate nearly four times greater than the rate of increase in the filing of such actions during the 1973-1977 time period.[13]

The congestion problem at the federal appellate level is even more severe.[14] During the 1977 fiscal year, the number of appellate court filings was 296.4% greater than the number of appellate court filings in 1962.[15] The number of appellate cases pending during the same time period has increased by 409.5%.[16] The severity of the burden at the appellate level becomes most apparent when the workload status of particular Circuits is examined. Since 1961, the number of appellate cases pending has increased by greater than 600% in more than half the Circuits.[17]

On the basis of data prepared for the Federal Judicial Center, Judge Friendly has explained the disproportionate increase in the appellate court workload:

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13. Since 1973, class action filings have increased by 18.8% while pending class actions have increased by 67.2%. 1977 Annual Report 121; 1973 Annual Report 177.

14. For example, pending actions per district judgeship have increased by 37.0% since 1971. Pending actions per appellate judgeship have increased during the same time period at a rate of 67.4%—a rate of increase almost twice as great as that at the district court level. 1977 Management Statistics for United States Courts 13, 127; 1976 Management Statistics for United States Courts 13, 127.

15. 1977 Annual Report 65a.

16. *Id.*

17. Such an increase has taken place in the following Circuits: Third, Fourth, Fifth, Sixth, Ninth and Tenth. 1977 Annual Report 65b.

> "[A]n increase in the number of filings in the district courts would be bound to mean a more than corresponding increase in appeals. Figures that have been recently produced are throwing more light on what has caused an increase in appeals . . . . This has not been so much an increase in the appeal rate which, . . . remained relatively static for civil cases taken as a whole (although with dramatic contrasts for particular categories), as a *doubling of the ratio of appealable civil judgments to total terminations.*" Friendly, *Averting the Flood By Lessening the Flow,* 59 Cornell L. Rev., 634, 649-50 (1974) (emphasis supplied).

Acceptance of Petitioner's argument in the present case necessarily would accelerate this increased workload trend in the federal appellate courts. All lawsuits containing class allegations and requests for injunctive relief, regardless of the propriety of such allegations or requests for relief, would present at least two stages of appealability as of right. Every district court denial, or even narrowing, of the class status sought by a plaintiff would become automatically appealable. Of course, every plaintiff would be entitled to appeal a second time when the district court entered a final judgment on the merits. Actually, if this Court were to accept Petitioner's argument that failure to grant the class sought by a plaintiff is appealable under 28 U.S.C. §1292(a)(1) because it has an adverse impact on the scope of the injunction which is prayed for in the complaint, most plaintiffs would have many more than two occasions on which they could appeal since there are many rulings other than class determinations which can have an

adverse impact upon the ultimate scope of a possible injunction.[18]

Thus, Petitioner advocates a departure from the firm policy of the final judgment rule at a time when the entire legal profession is attempting to devise ways to avoid the staggering burdens imposed on the federal court system, as well as the parties, by the ever-increasing federal court workload.[19] As we now discuss, such a departure is not justified by the wording of § 1292(a)(1), by prior precedent in the interpretation and application of this provision, by congressional policy, or by any other consideration.

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18. As discussed *infra,* discovery orders, rulings upon the admissibility of testimony, and many other procedural rulings may have an effect upon the scope of any possible injunction.

19. *See, e.g., Chief Justice Burger's 1977 Report to the American Bar Association,* 63 A.B.A.J. 504 (April 1977); Friendly, *Averting the Flood By Lessening the Flow,* 59 Cornell L. Rev. 634 (1974).

II. Section 1292(a)(1) Is a Limited Exception to the Final Judgment Rule and Is Not Applicable to the Present Appeal.

A. The Third Circuit Was Correct in Its Holding That the Denial of Class Action Status Is Not Appealable Under § 1292(a)(1).

The Third Circuit in the present case properly dismissed the appeal from the District Court's interlocutory order denying Petitioner's motion for class action status. The Third Circuit correctly held that an adverse class action determination order is not appealable under § 1292(a)(1) as the denial of an injunction. A trial court order denying class action status does not refuse an injunction. Such an interlocutory order does not determine the merits of a party's claim for injunctive relief. It simply indicates that the requirements of Fed. R.Civ.P. 23 have not been satisfied. As the Third Circuit explained:

> "A decision on class status is wholly procedural .... [I]t does not implicate the merits of the case at all. If, after judgment on the merits, the relief granted is deemed unsatisfactory, *the question of class status is fully reviewable.* The delay involved is the same delay that accompanies review of all interlocutory procedural rulings in a case, and the delay in no way diminishes the power of the court upon review to afford full relief." *Gardner v. Westinghouse Broadcasting Co.,* 559 F.2d 209, 212 (3rd Cir. 1977) (emphasis supplied).

The consistent position of the Third Circuit[20] has been that class action determination orders are appealable, in appropriate circumstances, under 28 U.S.C. § 1292 (b). *E.g., Gardner, supra,* 359 F.2d at 214; *Katz v. Carte Blanche Corp.,* 496 F.2d 747, 752 (3rd Cir.) (en banc), *cert. denied,* 419 U.S. 885 (1974).

Other Circuits have reached the same conclusion as the Third Circuit in holding that interlocutory orders denying class action status are not appealable as interlocutory orders refusing an injunction. Both the Second Circuit in *Williams v. Wallace Silversmiths, Inc.,* 566 F.2d 364, 365 (2d Cir. 1977),[21] and the Court of Appeals

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20. Petitioner has incorrectly characterized the Third Circuit's pre-*Gardner* approach to appealability under § 1292(a)(1) of orders denying class action status. [Petitioner's Brief at 39-40 n.13] For example, prior to *Gardner,* the Third Circuit, relying on *Hackett v. General Host Corp.,* 455 F.2d 618 (3rd Cir.), *cert. denied,* 407 U.S. 925 (1972), dismissed an appeal under § 1292(a)(1) from an interlocutory order which had granted class action status of a narrower scope than that requested by the plaintiff. *Piper v. Westinghouse Electric Corp.,* No. 74-1711 (3rd Cir. June 17, 1975).

21. The plaintiff in *Williams v. Wallace Silversmiths, supra,* sought both monetary damages and a permanent injunction. Petitioner has attempted to distinguish that case on the grounds that injunctive relief was not the heart of the complaint in the lawsuit. [Petitioner's Brief at 38 n.12]. Petitioner has not explained why that distinction is meaningful. Petitioner's argument that a denial of class action status is appealable as a refusal of an injunction would appear to be equally applicable to all cases seeking injunctive relief irrespective of whether such relief was the heart of the complaint. Otherwise, acceptance of Petitioner's argument would require an appellate court to determine whether injunctive relief was the heart of the remedy sought before ruling on its jurisdiction to hear the appeal.

for the District of Columbia in *Williams v. Mumford,* 511 F.2d 363, 369 (D.C. Cir.), *cert. denied,* 423 U.S. 828 (1975), have dismissed appeals of adverse class action determination orders under § 1292(a)(1) and have characterized the construction of this provision advanced by Petitioner here as "an unwarranted expansion of the statutory language."[22]

The Eighth Circuit in two recent cases has reserved the question whether an order denying class action status is appealable under § 1292(a)(1).[23] Nevertheless, in *Donaldson v. Pillsbury Co.,* 529 F.2d 979 (8th Cir. 1976) (per curiam), *cert. denied,* 46 U.S.L.W. 3218 (October 3, 1977), the Eighth Circuit held that an interlocutory order refusing to reconsider a prior adverse class action determination order is not appealable under this statute. Past decisions interpreting appealability under other exceptions to the finality rule embodied in § 1292(a) similarly indicate that the Eighth Circuit is not receptive to attempts to extend those limited exceptions beyond their express terms.[24]

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22. The Seventh Circuit has indicated that in a case such as the instant lawsuit, where the plaintiff has not requested a preliminary injunction, there would be no appeal as of right from the order denying class action status. *Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.,* 538 F.2d 164, 166 n.2 (7th Cir.) (en banc), *cert. denied,* 429 U.S. 986 (1976).

23. *Johnson v. Nekoosa-Edwards Paper Co.,* 558 F.2d 841, 844 (8th Cir. 1977); *Donaldson v. Pillsbury Co.,* 529 F.2d 979, 981 (8th Cir. 1976) (per curiam), *cert. denied,* 46 U.S.L.W. 3218 (October 3, 1977).

24. For example, the Eighth Circuit in *Florida v. United States,* 285 F.2d 596, 600 (8th Cir. 1960), held that an interlocutory order authorizing a receiver to gather assets and records was not appealable under

We submit that the cases cited in Petitioner's Brief at 36-37 for the proposition that an interlocutory order denying class action status is appealable under § 1292 (a)(1) were wrongly decided. For the reasons which follow, the Third Circuit, in the instant case, was clearly correct in its refusal to accept the unwarranted expansion of the statutory language of § 1292(a)(1) advocated by Petitioner.

B. An Order Does Not Constitute the Grant or Denial of an Injunction Under §1292(a)(1) Even Though It May Ultimately Affect the Scope of Injunctive Relief.

The grant of appellate jurisdiction embodied in § 1292(a)(1) is a limited and narrow exception to the final judgment rule. *E.g., Donaldson, supra,* 529 F.2d at 981.

The long-established rules of statutory construction require a narrow reading of the exception to the finality principle provided by § 1292(a)(1). As this Court explained in *Spokane & Inland Empire R.R. v. United States,* 241 U.S. 344, 350 (1916):

> "[E]xceptions from a general policy which a law embodies should be strictly construed."

This "canon of construction must be applied with redoubled vigor when the action sought to be reviewed

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§ 1292(a)(2) as an "interlocutory order appointing a receiver" for the following reasons:

> "Appellants argue that the . . . order is in practical effect the appointment of a receiver. The answer to this contention is that statutes authorizing interlocutory appeals are to be strictly construed. Changes in appeal jurisdiction should be made by appropriate legislation, not by judicial modification."

here is an interlocutory order of a trial court." *Goldstein v. Cox,* 396 U.S. 471, 478 (1970).

In addition to this basic principle of statutory construction, the history of § 1292(a)(1) suggests that Congress intended this provision to be a very limited exception to the final judgment rule of appealability. The following review of the detailed consideration of the history of §1292(a)(1) set forth in *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176 (1955), illustrates the limited exception Congress intended this statute to provide.

In 1891, the Evarts Act created an exception to the final judgment rule in situations "where, upon a hearing in equity . . . an injunction shall be granted or continued by an interlocutory decree. . . ." 26 Stat. 828 (1891). In 1895, this provision was amended to provide immediate appealability "where, upon a hearing in equity . . ., an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree or an application to dissolve an injunction shall be refused. . . ." 28 Stat. 666-67 (1895).[25] For uncertain reasons, the 1895 version was repealed five years later. 31 Stat. 660 (1900). In 1911, the 1895 formulation for immediate appealability was reenacted. 36 Stat. 1134 (1911). The

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25. The Congressional purpose for the 1895 revision has been explained in *Stewart-Warner Corp. v. Westinghouse Electric Corp.,* 325 F.2d 822, 830 (2d Cir. 1963) (Friendly, J., dissenting), *cert. denied,* 376 U.S. 944 (1964), as follows:

> "[I]t seems rather plain that Congress was thinking primarily of the case where erroneous denial of a *temporary* injunction may cause injury quite as irreparable as an erroneous grant of one." (emphasis in original).

words "in equity" later were deleted from the reference to "upon a hearing in equity" in the statute. 43 Stat. 937 (1925).[26] In 1948, the words "upon a hearing" also were inexplicably deleted from the statute. 62 Stat. 929 (1948).[27]

This Court in *Baltimore Contractors* summarized the history of §1292(a)(1) in the following manner:

> "No discussion of the underlying reasons for modifying the rule of finality appears in the legislative history, although the changes seem plainly to spring from a developing need to permit litigants to effectually challenge *interlocutory orders of serious, perhaps irreparable, consequence.*" *Baltimore Contractors, supra,* 348 U.S. at 181 (emphasis supplied).

In accordance with the limited purpose of this statute and the above-mentioned rule of statutory construction, this Court has stated that it has a responsibility to ensure that the limited exception to the finality rule provided by § 1292(a)(1) is applied as written by

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26. This Court has declared that this deletion "was not intended to remove that limitation." *Schoenamsgruber v. Hamburg American Line,* 294 U.S. 454, 457 n.3 (1935). Judge Friendly argues that this limitation "strongly suggest[s]" that § 1292(a)(1) is limited to orders granting or denying temporary injunctive relief. *Stewart-Warner, supra,* 325 F.2d at 830. *Accord, Chappel & Co. v. Frankel,* 367 F.2d 197, 203-04 (2d Cir. 1966) (en banc).

27. Relying on this Court's decision in *Fourco Glass Co. v. Transmirra Products Corp.,* 353 U.S. 222, 227-228 (1957), Judge Friendly has stated that this deletion also was not intended to make substantive changes in the statute. *Stewart-Warner, supra,* 325 F.2d at 830.

Congress and not construed in a manner that would result in an unwarranted expansion of appellate court jurisdiction. *Baltimore Contractors, supra,* 348 U.S. at 181. In order to ensure that no unwarranted expansion of appellate court jurisdiction will take place, it is "better judicial practice to follow the precedents which limit appealability of interlocutory orders, leaving Congress to make such amendments as it may find proper." *Baltimore Contractors, supra,* 348 U.S. at 185. Indeed, such judicial deference to proper legislative functions is appropriate. As this Court has observed:

> "When the pressure rises to a point that influences Congress, legislative remedies are enacted. The Congress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants. When countervailing considerations arise, interested parties and organizations become active in efforts to modify the appellate jurisdiction . . . ." *Baltimore Contractors, supra,* 348 U.S. at 181.[28]

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28. The Interlocutory Appeals Act of 1958 [28 U.S.C. § 1292(b)], which was enacted three years after this Court's decision in *Baltimore Contractors,* is an example of such legislative modification of appellate jurisdiction.

A more recent example is the Department of Justice's proposals for reform of class action procedures. Section 5 of the Department of Justice's Draft Statute would amend § 1292(a) by adding a fifth subsection to that provision. This amendment would grant appellate jurisdiction from interlocutory orders of district courts which refuse to permit certain actions to proceed as class actions. [1977] ANTITRUST & TRADE REG. REP. (BNA) (No. 842, Dec. 8, 1977) F-6. This is merely a recent example of the fact that Congress con-

Appellate jurisdiction should be limited to appeals from district court interlocutory orders which are expressly authorized by § 1292(a)(1) because of the narrow exception to the finality rule which this grant of jurisdiction was intended to provide. Appellate jurisdiction of appeals from district court orders which deny class action status is not specifically provided for in § 1292(a)(1). "In the absence of clear and explicit authorization of Congress, piecemeal appellate review is not favored." *Goldstein, supra,* 396 U.S. at 478.

Petitioner argues that appellate jurisdiction under § 1292(a)(1) should be extended to appeals from district court orders which deny class action status in cases where a complaint contains a prayer for permanent injunctive relief. Petitioner's theory is that denial of class status may narrow the scope of the injunctive relief which may eventually be awarded. [Petitioner's Brief at 38-39]. She argues that § 1292(a)(1) jurisdiction lies because, under her theory, an adverse impact upon the ultimate scope of a possible injunction results whenever a district court refuses to certify any class or certifies a class narrower than that sought by the plaintiff.

Such an expansive construction is inconsistent with the fundamental nature and purpose of § 1292(a)(1) which allows interlocutory review of only those orders which directly and immediately grant or refuse injunctive relief. The purpose of the modification of the finality rule embodied in § 1292(a)(1) was "to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Baltimore Contrac-*

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tinues to have the legislative option of revising § 1292(a) to provide for review of class action determination orders if it so desires.

tors, supra, 348 U.S. at 181. The serious and irreparable consequences which justify direct interlocutory appeal involve the immediate substantive impact of the orders rather than their eventual procedural effects. *See Chappel, supra,* 367 F.2d at 203.

Regardless of its ultimate impact on the conduct of the litigation, a denial of class action status does not have immediate and irreparable consequences vis-a-vis the merits of the case. As was explained in the opinion of the Third Circuit:

> "We understand the conceptual basis of the theory advanced by Ms. Gardner. She argues that the ultimate injunctive relief in a successful action may be narrower if class status is denied than if class status were granted. But this effect will occur, if at all, only after a decision on the merits of the prayer for injunctive relief. Prior to that time, an order denying a class certification does not 'touch on the merits of the claim' nor does it have 'final and irreparable effect on the rights of the parties.' In sum, a class determination, affirmative or negative, lacks the immediate and drastic consequences which attend an injunction and which form the basis for excepting injunctive rulings from the final judgment rule." *Gardner, supra,* 559 F.2d at 213.

The crux of Petitioner's argument is that the denial of class action status has adversely affected Petitioner's ability to prepare a record upon which the District Court could order injunctive relief for members of the putative class. More specifically, Petitioner argues that such denial has restricted Petitioner's ability to obtain discovery and present evidence at trial. [Petitioner's Brief at 32]. This argument is without merit, for it ignores

the fact that discovery and trial evidentiary rulings in her case would not be appealable prior to final judgment under any view of appellate jurisdiction.

Many types of interlocutory orders of a trial court have a significant impact on a litigant's ability to obtain the relief sought. Such considerations, however, have not been viewed as sufficient grounds for contravening the strong and explicit Congressional policy against piecemeal appeals. As this Court declared in *City of Morgantown, West Virginia v. Royal Insurance Co.*, 337 U.S. 254, 258 (1949):

> "It is argued that the importance of an interlocutory order denying or granting jury trial is such that it should be appealable. Many interlocutory orders are equally important, and may determine the outcome of the litigation, but they are not for that reason converted into injunctions."

Interlocutory orders issued by a district court which direct or deny discovery, for example, are not immediately appealable. *E.g., Alexander v. United States,* 201 U.S. 117 (1906); *Time, Inc. v. Ragano,* 427 F.2d 219, 221 (5th Cir. 1970) ("The order does not constitute an interlocutory injunction within 28 U.S.C.A. § 1292(a) because that subsection does not encompass protective orders entered under the discovery rules."); 4 Moore's Federal Practice ¶ 26.83[3], at 585 (2d ed. 1976). Professor Moore has observed that the many attempts by litigants to make discovery orders immediately appealable by converting them into orders granting or denying an injunction have met with "general failure." 9 Moore's Federal Practice ¶ 110.20[1], at 233 (2d ed. 1975).[29]

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29. Such discovery orders have been viewed as nonappealable interlocutory orders despite the important impact that such orders have on litigants. In holding that a trial court order directing a witness to answer certain deposition questions was not appealable under either § 1291 or § 1292, the Third Circuit explained the competing policy considerations in the following manner:

> "Every interlocutory order involves, to some degree, a potential loss. That risk, however, must be balanced against the need for efficient federal judicial administration as evidenced by the Congressional prohibition of piecemeal appellate litigation. To accept the appellant's view is to invite the inundation of appellate dockets with what have heretofore been regarded as nonappealable matters. It would constitute the courts of appeals as second-stage motions courts. . . ." *Borden Co. v. Sylk,* 410 F.2d 843, 846 (3rd Cir. 1969).

District court evidentiary rulings are likewise not subject to interlocutory review.[30] The opinion of the Third Circuit in this case cited evidentiary rulings as an example of important interlocutory decisions which are not appealable:

> "We do not deny the importance of the class action determination in many cases. . . . But the possible effects of a ruling are not determinative of whether it can be immediately appealed. Evidentiary rulings, for example, can be critically important but

30. "A litigant may not appeal each adverse evidentiary ruling separately and by itself." *Merino v. Hocke,* 324 F.2d 687, 689 (9th Cir. 1963). The basis for nonappealability of such evidentiary rulings has been explained as follows:

> "Rulings rendered during the course of trial are paradigms of nonfinality. Immediate appeal would be grossly disruptive of any orderly trial process. Review must await entry of a final judgment." Wright, Miller & Cooper, Federal Practice and Procedure: *Jurisdiction* § 3915, at 591 (1976).

they are not the proper subject of an interlocutory appeal." *Gardner, supra,* 559 F.2d at 212.

In the course of holding that an order denying a post-indictment motion to return papers and suppress evidence obtained therefrom was not immediately appealable, this Court in *Cogen v. United States,* 278 U.S. 221, 223-224 (1929), reviewed the considerations involved in the appealability of what was essentially an evidentiary ruling to suppress evidence unconstitutionally obtained. This Court declared:

> "Usually the main purpose of the motion for the return of papers is the suppression of evidence at the forthcoming trial of the cause. The disposition made of the motion will necessarily determine the conduct of the trial and may vitally affect the result. In essence, the motion resembles others made before or during a trial to secure or suppress evidence. . . . The orders made upon such applications, so far as they affect only rights of parties to the litigation, are interlocutory. . . . It is only when disobedience happens to result in an order punishing criminally for contempt, that a party may have review by appellate proceedings before entry of the final judgment in the cause." (citations omitted).

In addition to discovery orders and evidentiary rulings, there are other types of trial court orders which vitally affect the litigation and the scope of available relief but are not appealable prior to final judgment.[31]

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31. For example, a ruling on a motion for transfer of venue under 28 U.S.C. §§ 1404(a) or 1406(a) is not appealable as a grant or denial of injunctive relief. *E.g., M. Spiegel & Sons Oil Corp. v. B.P. Oil Corp.,* 531 F.2d 669, 670 (2d Cir. 1976) (per curiam); 9 Moore's Federal Practice ¶ 110.20[1], at 233 (2d ed. 1975).

A district court order, even if phrased in mandatory or prohibitive terms, is not appealable as an interlocutory order granting or refusing an injunction unless it actually grants or refuses all or part of the requested injunctive relief. *See* 9 Moore's Federal Practice ¶ 110.20 [1], at 233-234 (2d ed. 1975).

In sum, a district court's interlocutory order must actually grant or deny an injunction to be appealable under § 1292(a)(1). The fact that a trial court order has a substantial impact on the litigation and may narrow the scope of available relief generally has not been viewed as a sufficient reason for allowing immediate appeal of such an interlocutory order. As the Court of Appeals for the District of Columbia stated in *Williams v. Mumford,* 511 F.2d 363, 369 (D.C. Cir.), *cert. denied,* 423 U.S. 828 (1975):

> "It is argued that the net effect of the refusal to certify a class action is considerably to narrow the scope of any possible injunctive relief in the event plaintiffs ultimately prevail on the merits. Appellants cite in support of their position two cases from other Circuits: *Brunson v. Board of Trustees* and *Yaffee v. Powers.* Both cases are premised on the assumption that the refusal to certify a class action, since it would eventually affect the scope of equitable relief, itself constituted a modification of or a refusal to issue an injunction. We view this as an unwarranted expansion of the statutory language."[32]

In seeking to have this Court embrace an "effective"

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32. Petitioner also suggests that § 1292(a)(1) should be extended to interlocutory orders denying class action status because immediate review might avoid an unnecessary trial and its attendant expense. [Petition-

grant or denial standard of appealability under § 1292 (a) (1), Petitioner incorrectly asserts that decisions of this Court hold that other orders which do not expressly grant or deny an injunction are nevertheless appealable under this statute. [Petitioner's Brief at 21-28, 35-36]. Those decisions of this Court cited by Petitioner to support this assertion involved trial court orders of essentially two basic categories: (1) either the grant or refusal to hear a party's equitable claim or action in

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er's Brief at 52-54]. Such considerations have never been viewed as a sufficient basis for contravening the finality rule. Immediate review of an interlocutory order denying a motion for summary judgment might prevent an unnecessary trial and its related expense. Nevertheless, this Court has held that a trial court order denying a summary judgment because of the existence of an unresolved issue of fact is not appealable under § 1292 (a) (1). *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966). This Court has likewise held that an order refusing to stay an action for an accounting pending arbitration is not appealable as the denial of an injunction despite the fact that an immediate appeal could have avoided the considerable expense of a possibly unnecessary proceeding. *Baltimore Contractors, supra,* 348 U.S. at 186 (Black, J., dissenting). Similarly, immediate appellate review does not exist from a trial court order which grants a motion for a new trial. *E.g., Evans v. Calmar S.S. Co.*, 534 F.2d 519 (2d Cir. 1976); *Wiggs v. Courshon,* 485 F.2d 1281 (5th Cir. 1973).

Moreover, there is no right to interlocutory appeal of an order *granting* class certification. Nevertheless, such an order, if ultimately reversed, results in far greater unnecessary expense than does a later-reversed denial of class certification. Beyond the inherent costs and delays which result from any retrial, there are the irreparable costs of the more extensive discovery and the more complex and prolonged litigation in an improperly certified class action which cannot be redressed by reversal on appeal.

advance of a claim or action at law involving common or interlocking issues;[33] and (2) the complete dismissal of a claim or a party—or the entry of a summary judgment in favor of a claim or party—in lawsuits seeking injunctive relief.[34] These two types of interlocutory

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33. This request may arise through motions to hear equitable claims before legal claims, to stay an equitable or legal action, or to grant a jury trial in an action commenced in equity which involves a legal counterclaim.

34. The decisions of this Court relied upon by Petitioner which come within the former category are: *Baltimore Contractors, supra*; *City of Morgantown, West Virginia v. Royal Insurance Co.*, 337 U.S. 254 (1949); *Ettelson v. Metropolitan Life Insurance Co.*, 317 U.S. 188 (1942); *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449 (1935); *Enelow v. New York Life Insurance Co.*, 293 U.S. 379 (1935). The sole decision cited by Petitioner in the latter category is: *General Electric Co. v. Marvel Rare Metals Co.*, 287 U.S. 430 (1932).

Two decisions of this Court cited by Petitioner in support of her proposition—that interlocutory orders which do not expressly grant or deny an injunction can be appealed under § 1292(a) (1)—do not fall into either of these categories. *Liberty Mutual Insurance Co. v. Wetzel,* 424 U.S. 737 (1976); *George v. Victor Talking Machine Co.*, 293 U.S. 377 (1934). Neither decision supports Petitioner's argument. In *Wetzel*, this Court noted in dictum that "it might be argued" that a plaintiff could appeal from a decision on the merits which failed to grant injunctive relief, but it held that in any event the defendant who had taken the appeal in that case could not raise this argument. The dictum simply recognized the existence of an argument which was found not to be before the Court. In *George,* the interlocutory decree from which an appeal was taken under § 1292 (a) (1) did expressly grant an injunction so the court was not confronted with the question of whether an order which indirectly had such an effect would be appealable.

orders are inherently different than a denial of class action status and, therefore, do not support an extension of the explicit language of § 1292(a)(1) to appeals from trial court orders denying class action status.

This Court has reviewed a series of five cases involving the appealability of an interlocutory order where a trial court essentially grants or refuses to give initial consideration to an equitable claim or action. The resolution of these cases was grounded in the historic differences between equity and law and the need to protect a litigant's right to a jury trial.[35] Due to their unique historic basis, these decisions should be viewed as *sui generis,* and they therefore do not provide support for Petitioner's argument that adverse class action determination orders are appealable under § 1292(a)(1) as orders "effectively" denying injunctive relief. Furthermore, a close reading of these decisions mandates a rejection of Petitioner's argument.

A chronological comparison of these five cases reveals the extent to which their resolution was grounded on the historic differences between law and equity. In the three earliest decisions,[36] this Court essentially held that a trial court order granting or refusing to hear equitable claims first was appealable under § 1292(a)(1) where the lawsuit was commenced on the basis of a claim at law. Where the original lawsuit was based on equitable claims, however, the two most recent de-

35. *See* 9 Moore's Federal Practice ¶ 110.20[3], at 240-246 (2d ed. 1975); Note, *Appealability in the Federal District Courts,* 75 Harv. L. Rev. 351, 371-74 (1961).

36. *Ettelson, supra*; *Shanferoke Coal, supra*; *Enlow, supra.*

cisions of this Court[37] found that similar refusals to defer consideration of an equitable action pending arbitration or to defer consideration of an equitable claim so that a jury trial could be held on a legal counterclaim were not so appealable.[38]

Regardless of whether the lawsuit was commenced on the basis of claims at law or equity, the issuance in these five cases of trial court orders essentially granting or refusing to hear equitable claims or actions prior to claims or actions at law had the same "effect"—they determined whether the equitable claims or actions would be initially considered by the trial court.[39] Despite the fact that the trial courts' orders had the same "effect" in each of these cases, this Court reached different conclusions on the question of the appealability of these interlocutory orders under § 1292(a)(1) or its statutory predecessor. This Court based its resolution of the appealability issue upon the historic rules involving potential conflicts between courts of law and equity. No such historic rules are present in the instant case. In this regard, the present case is quite similar to *Baltimore Contractors.* Since the refusal in that case to stay an accounting pending arbitration was not appealable as

37. *Baltimore Contractors, supra*; *City of Morgantown, supra.*

38. Rather, the trial court orders were found to be simply "ruling[s] as to the manner in which he [trial judge] will try one issue in a civil action pending before himself." *City of Morgantown, supra,* 337 U.S. at 257.

39. The fact that the trial court orders from which an appeal was taken had the same effect in all five cases was made clear in the dissenting opinions by Justice Black in the latter two decisions. *See, Baltimore Contractors, supra,* 348 U.S. at 185-186; *City of Morgantown, supra,* 337 U.S. at 262.

a denial of an injunction, it would appear *a fortiori* that the denial of class action status in the instant case is not appealable under § 1292(a)(1). Thus, Petitioner has mistakenly relied on the five decisions of this Court under discussion to support her incorrect argument that an "effective" grant or denial of injunctive relief is the proper standard for appealability under § 1292(a)(1).[40]

In fact, these five decisions of this Court dictate the rejection of Petitioner's argument. When determining appealability under § 1292(a)(1), lower courts and litigants have been cautioned by this Court that its earlier decisions should be viewed in the context of the historic distinctions between law and equity so as to restrict piecemeal appeals. As this Court declared in *Baltimore Contractors, supra,* 348 U.S. at 184-185:

> "The reliance on the analogy of equity power to enjoin proceedings in other courts has elements of fiction in this day of one form of action. . . . The distinction has been applied for years, however, and we conclude that *it is better judicial practice to follow the precedents which limit appealability of interlocutory orders,* leaving Congress to make such amendments as it may deem proper." (emphasis supplied).

Contrary to this Court's directive in *Baltimore Contractors,* Petitioner now attempts to rely on that line of case authority to expand such appealability. Petitioner's effort to so extend appealability under § 1292(a)(1) should be rejected because, as this Court declared in *City of Morgantown, supra,* 337 U.S. at 258:

> "[D]istinctions from common law practice which supported our conclusions in the *Enelow* and *Ettelson* Cases supply no analogy competent to make an injunction of what in any ordinary understanding of the word is not one."

Petitioner also has cited a second category of cases which found the following interlocutory orders to be immediately appealable: the complete dismissal of a claim or a party, and the entry of summary judgment in favor of a claim or party. Such interlocutory orders are inherently different than a trial court order denying class action status.

A class action determination order does not reach the merits, while dismissal or summary judgment orders actually grant or deny an injunction because they are entered by the trial court only after a final and unconditional determination on the merits that injunctive relief can or cannot be obtained in the pending lawsuit.

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40. The analysis of the Second Circuit in *M. Spiegel & Sons Oil Corp. v. B. P. Oil Corp.,* 531 F.2d 669, 670-671 (2d Cir. 1976) (per curiam), is instructive in this regard. In holding that a district court order refusing to stay or transfer an action was not appealable under § 1292(a)(1), the Second Circuit relied on *Baltimore Contractors* and *City of Morgantown,* stating:

> "[A]ppellant attempts to create an independent basis of jurisdiction through application of the so-called *Enelow-Ettelson* rule. . . . '[T]he practical effect of that rule is to permit, in certain actions, appeals from two kinds of orders: (1) orders granting or denying trial by jury; and (2) orders staying or refusing to stay pending actions until issues involved in them are referred to arbitration.' 9 Moore's Federal Practice ¶ 110.20[3], at 240. We, however, see little merit in further modifying § 1292(a)(1) through extension of this exception well beyond the narrow confines in which it historically has developed. . . ." (citations omitted).

The very decision of this Court cited by Petitioner makes this distinction clear. This Court in *General Electric Co. v. Marvel Rare Metals Co.*, 287 U.S. 430, 433 (1932), explained its holding that a dismissal of a counterclaim for injunctive relief was appealable under the statutory predecessor to § 1292(a)(1) as follows:

> "But by their motion to dismiss, plaintiffs themselves brought on for hearing the very question that, among others, would have been presented to the court upon formal application for an interlocutory injunction. That is, whether the allegations of the answer are sufficient to constitute a cause of action for injunction. And the court necessarily decided that upon the facts alleged in the counterclaim defendants were not entitled to an injunction."

Petitioner also relies on certain lower court cases to support her argument that some trial court orders which do not expressly grant or deny an injunction are appealable under § 1292(a)(1). [Petitioner's Brief at 42-43]. The lower court cases cited by Petitioner involving summary judgment or dismissal orders[41] are inherently different than orders denying class action status because the former orders are based on a determination on the merits and actually grant or deny injunctive relief. As the Second Circuit explained in *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 461 F.2d 1040, 1041 (2d Cir. 1972), which is relied on by Petitioner:

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41. We submit, for the reasons expressed throughout this brief, that those lower court decisions cited by Petitioner which allowed immediate appealability of interlocutory orders other than summary judgment or dismissal orders were incorrectly decided.

> "In granting in part defendant's motion for summary judgment, the district court's order in effect constituted a final denial on the merits of the injunctive relief prayed for by plaintiff. . . ."

A denial of class action status possesses none of the characteristics that make dismissal or summary judgment orders appealable as injunctions. Unlike such dismissal and summary judgment orders, an adverse class action determination order is not based on the merits of the case and does not pass on the legal sufficiency of any claims for injunctive relief. An order denying class action status is a procedural order which simply indicates that the requirements of Fed.R.Civ.P. 23 have not been satisfied; it does not adjudicate the merits of the case. *Gardner, supra,* 559 F.2d at 212.[42] The Third Circuit's distinction between procedural orders and orders based on the merits is grounded in this Court's decision in *Switzerland Cheese Association v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966). In holding that a denial of a motion for summary judgment was not appealable under § 1292(a)(1), this Court there declared:

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42. Petitioner attempts to blur this distinction by incorrectly characterizing the class action determination order by the District Court in the present case as "touching on the merits." [Petitioner's Brief at 29-30]. A review of the record in the present case reveals that the District Court properly limited its inquiry to the question of whether the criteria of Rule 23 were satisfied and did not reach the merits of Petitioner Gardner's claim. Furthermore, an expansion of the limited scope of § 1292(a)(1) is not a proper means for correcting a trial court's alleged abuse of its functions. As discussed *infra* at 67, the writ of mandamus is the proper and adequate avenue for remedying any alleged abuses.

> "[T]he denial of a motion for summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order. . . ."

An expansive construction of § 1292(a)(1) should not be readily adopted in view of the potential burden on the workload of the appellate court system that would result from the acceptance of Petitioner's argument. In *Switzerland Cheese, supra,* 385 U.S. at 24, this Court declared the following rule of judicial restraint concerning the interpretation of § 1292(a)(1).

> "[W]e approach this statute somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders."

To adopt Petitioner's argument that the "effect" of an interlocutory order not reaching the merits can render it appealable under § 1292(a)(1) would overburden the appellate courts with a broad new category of piecemeal appeals. The problem may be highlighted by a comparison of the result advocated by Petitioner with the holding of *Liberty Mutual Insurance Co. v. Wetzel,* 424 U.S. 737 (1976). In *Wetzel* this Court held that an order which granted judgment on the merits for plaintiffs without ruling on the request for injunctive relief was not appealable by defendants under § 1292(a)(1) despite its inherent effect on the ultimate availability of injunctive relief.

By contrast, under Petitioner's theory, every order arguably narrowing the scope of eventual relief would be immediately appealable as of right under § 1292(a)(1). For example, an order denying joinder of additional plaintiffs would arguably limit the scope of any eventual injunction. Likewise, orders dismissing some but not all causes of action on grounds short of the merits, such as lack of personal or subject-matter jurisdiction, improper venue, ripeness, mootness or abstention, would be immediately appealable insofar as they precluded injunctions relating to those causes of action. Petitioner in her brief emphasizes that the denial of discovery in this case was also an order possibly having the effect of limiting the scope of any possible injunction. [Petitioner's Brief at 32]. A rule of appealability based upon the eventual possible "effect" of an order thus has no easily definable limits and could be applied to a broad range of interlocutory orders.

Application of the "effective" grant or denial standard of appealability under § 1292(a)(1) would provide plaintiffs with numerous opportunities to obtain piecemeal review of interlocutory orders short of the merits. A rule permitting appeal as of right from all orders arguably narrowing the scope of possible injunctive relief would encourage plaintiffs to include prayers for injunctive relief in all cases[43] and to add nonjusticiable claims to their complaints or make dubious motions during the course of litigation so as to increase their opportunities for obtaining interlocutory appellate review. Such a practice would undermine the final judgment rule which, as articulated in *Wetzel,* can prevent even a judgment on the merits from being reviewed in the absence of an order actually granting or denying injunctive relief. Were § 1292(a)(1) to be extended to orders "effectively" granting or denying injunctions, the magnitude of the resulting increase in the federal ap-

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43. This possibility troubled the Third Circuit here. *Gardner, supra,* 559 F.2d at 212.

pellate work-load would certainly be considerable, with the possibility of one or more interlocutory appeals as of right in every class action and perhaps in all lawsuits seeking injunctive relief.[44]

The "in effect" rule would further burden the appellate courts with the task of determining in each case the jurisdictional question of whether the order appealed from had the "effect" of granting or denying an injunction. Professor Moore has criticized the attempts of litigators to characterize interlocutory orders as injunctive for purposes of obtaining appellate review under § 1292(a)(1), noting that "ingenious counsel have found injunctions lurking in virtually every ruling that a district court can be called upon to make." 9 Moore's Federal Practice ¶ 110.20[1], at 233 (2d ed. 1975). Acceptance of the *ad hoc* expansion of § 1292(a)(1) advocated by Petitioner would provide an impetus to attempts by litigants to appeal a variety of presently nonappealable district court orders. As this Court has recognized:

> "Any such *ad hoc* decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money." *Baltimore Contractors, supra,* 348 U.S. at 181.

Adoption of the "effective" grant or denial standard of appealability under § 1292(a)(1) would invite appeal of virtually every important interlocutory order in cases

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44. The "effective" grant or denial standard of appealability proposed by Petitioner would not seem to be limited to class action determinations, and there appears to be no articulable basis for so limiting it. The effect of the denial of class action status would not seem to be distinguishable from the effect of certain orders in individual actions such as those which deny joinder or grant dismissal short of the merits as to particular causes of action

where injunctive relief was sought, causing the final judgment rule to be swallowed up by what was intended as a narrow exception.[45]

In sum, any *ad hoc* expansion of § 1292(a)(1) to encompass orders "effectively" granting or refusing injunctive relief would have an adverse impact on federal judicial administration at both the trial and appellate levels by burdening the courts of appeals with unnecessary interlocutory appeals which would interrupt and delay the proceedings in the district courts.

In a case arising under 28 U.S.C. § 1253 of the Three Judge Court Act,[46] this Court has held that an interlocutory appeal will lie only from an order granting or denying a preliminary injunction. *Goldstein v. Cox,* 396 U.S. 471 (1970). The plaintiffs' complaint in that case had requested both preliminary and permanent injunctions ordering that they be paid sums held in an account. This Court held that an order denying plaintiffs' motion

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45. The opinion of the Third Circuit emphasized the risk of this potential outcome in rejecting the "in effect" standard of appealability:

> "[W]e would face in each case the question whether the particular refusal did or did not amount to the denial of an injunction. We would be faced with piecemeal review of that issue and the general rule of § 1291 and *Katz* [*v. Carte Blanche Corp., supra*] would be effectively swallowed up by the § 1292(a)(1) exception." *Gardner, supra,* 559 F.2d at 212.

46. That section, which is analogous to § 1292(a)(1), provides that direct appeal from a three-judge court may be taken to the Supreme Court "from an order granting or denying . . . an interlocutory or permanent injunction." Compare § 1292(a)(1) which provides for review of "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions."

for summary judgment was not appealable under § 1253. The opinion pointed out that there had been no denial of a preliminary injunction because plaintiffs had taken no steps to obtain such an injunction beyond requesting it in the complaint and because the release of funds could only have been ordered after final judgment so that "preliminary injunctive relief could never have been a practical possibility." 396 U.S. at 479. The denial of summary judgment obviously had the *effect* of denying plaintiffs a *permanent* injunction, and an actual denial would have been expressly appealable under § 1253. Yet despite the effect of the order, this Court did not find that an injunction had been denied. Although the "effect" of the order was not expressly at issue in *Goldstein,* the case stands firmly for the proposition that only orders which actually grant or deny injunctive relief are appealable under statutory provisions for interlocutory review of orders granting or refusing injunctions.

C. EVEN IF AN "EFFECTIVE" DENIAL OF INJUNCTIVE RELIEF WERE APPEALABLE UNDER § 1292(a)(1), THE DENIAL OF CLASS ACTION STATUS IN THE INSTANT CASE WAS NOT AN "EFFECTIVE" DENIAL OF INJUNCTIVE RELIEF.

Petitioner argues that the District Court's denial of class action status effectively precluded the putative class members from obtaining injunctive relief. [Petitioner's Brief at 13]. This assertion is simply incorrect. Class determinations are subject to possible revision, and the District Court may subsequently decide to grant class action status. Moreover, the District Court may grant injunctive relief in Petitioner's individual action which redounds to the benefit of members of the putative class. Furthermore, individual members of the puta-

tive class may intervene in the instant lawsuit if they wish to obtain injunctive relief. Thus, the actual scope of injunctive relief in this case, if any were to be granted, will not be known until after the trial on the merits has been conducted.

1. *Class Determination Decisions Are Inherently Subject to Possible Reconsideration and Revision.*

An interlocutory order denying class action status is tentative in nature and may be altered or amended by the trial court at any time prior to a final decision on the merits. Fed.R.Civ.P. 23(c)(1) provides that:

> "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. *An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.*" (emphasis supplied).

Petitioner argues that while a grant of class action status may be altered or amended, a denial of class action status may not be subsequently modified. [Petitioner's Brief at 20-21]. The express language of Rule 23(a)(1) makes no such distinction between orders which grant and those which deny class action status. Rather, the explicit language of the Rule provides that any class action determination order is subject to subsequent alteration or amendment.

This conclusion is consistent with the authority cited by Petitioner. Contrary to Petitioner's assertion,[47]

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47. Petitioner's Brief at 20.

the text of the *Proposed Rules of Civil Procedure, Advisory Committee's Note to Rule 23(c)(1),* 39 F.R.D. 69, 104 (1966), does not state that a denial of class action status cannot subsequently be altered or amended.[48]

Petitioner's argument that the denial of class certification cannot later be altered overlooks the District Court's inherent power to modify its interlocutory or-

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48. The Advisory Committee's Note simply states:

"A negative determination means that the action should be stripped of its character as a class action. . . . Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled. . . ."

The comments by the Advisory Committee are phrased in terms of the broad power of a district court to permit intervention and do not address the issue whether an order denying class status may be modified at a later date. Even assuming the Advisory Committee's comments actually said that an order denying class action status could not subsequently be altered, that interpretation would not be controlling because the express language of Rule 23(c)(1) provides that all class action determination orders may be altered or amended by the district court.

Similarly, this Court in *United Airlines, Inc. v. McDonald,* 432 U.S. 385, 398-99 (1977), did not declare that an order denying class action status was immune from subsequent alteration. Petitioner's apparent contention to the contrary is incorrect. [Petitioner's Brief at 20-21]. This Court in *McDonald* simply quoted the language of the Advisory Committee's comments set forth above and did not address the issue whether a negative class action determination order may later be modified by the trial court.

ders.[49] This Court repeatedly has recognized a trial court's inherent power to reconsider and alter its interlocutory orders or decrees before the entry of final judgment. As this Court has declared:

> "[T]he court did not lack power at any time prior to entry of its final judgment . . . to reconsider any portion of its decision and reopen any part of the case . . . . It was free in its discretion to grant a reargument based either on all the evidence then of record or only the evidence before the court when it rendered its interlocutory decision, or to reopen the case for further evidence." *Marconi Wireless Telegraph Co. of America v. United States,* 320 U.S. 1, 47-48 (1943) (citations omitted).

On another occasion, this Court similarly declared:

> "If it [the decree] be only interlocutory, the court, at any time before final decree, may modify or rescind it." *John Simmons Co. v. Grier Brothers Co.,* 258 U.S. 82, 88 (1921).

The lower courts have consistently applied the principle that a trial court is inherently empowered to alter or amend its interlocutory orders or decrees. *E.g., Braden v. University of Pittsburgh,* 552 F.2d 948, 954 (3rd Cir. 1977) (en banc); *Bon Air Hotel, Inc. v. Time, Inc.,* 426 F.2d 858, 862 (5th Cir. 1970); *Walsh v. City of De-*

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49. Petitioner's position is also contrary to the spirit of the Federal Rules of Civil Procedure. It is expressly provided in Fed.R.Civ.P. 82 that "[t]hese rules should not be construed to . . . limit the jurisdiction of the United States district courts. . . ." Similarly, the enactment of these rules would appear to have been intended not to restrict the inherent powers of the district courts.

troit, 412 F.2d 226, 227 (6th Cir. 1969) (per curiam). This principle is clearly applicable to interlocutory orders denying class action status. In *Walsh,* the district court originally held that the lawsuit could not proceed as a class action and ordered the class allegations stricken from the complaint. Upon reconsideration, the district court granted class action status and reinstated the class action portions of the complaint. In discussing the tentative nature of class action determination orders, the Sixth Circuit declared:

> "Even without this Rule [Fed.R.Civ.P. 23(c)(1)], the District Court had the power and authority to reconsider any of its orders entered during pendency of the case, which orders had not become final." *Walsh, supra,* 412 F.2d at 227.

Other lower courts also have recognized that district court orders which deny class action status or decertify a previously certified class action can subsequently be altered or amended by the trial court. *E.g., Lamphere v. Brown University,* 553 F.2d 714, 719 (1st Cir. 1977); *In re Piper Aircraft Distribution System Antitrust Litigation,* 551 F.2d 213, 217 (8th Cir. 1977); *Gerstle v. Continental Airlines, Inc.,* 466 F.2d 1374, 1377 (10th Cir. 1972); *Parker v. Kroger Co.,* 13 EPD ¶ 11,527, at 6892 (N.D. Ga. 1976); *Robinson v. Penn Central Co.,* 58 F.R.D. 436, 442 (S.D.N.Y. 1973).

Thus, the order denying class action status in the instant case was not an "effective" denial of injunctive relief. This interlocutory order was, and is, subject to

the District Court's inherent power of modification.[50] The scope of injunctive relief to be issued in the instant case, if any, will not be known until after trial on the merits of Petitioner's request for a permanent injunction. For this reason alone, there has been no denial of an injunction.

2. *The Full Scope of Injunctive Relief Which Could Be Granted in Petitioner's Individual Lawsuit Cannot Be Determined in Advance of a Final Decision on the Merits.*

Even if this case proceeds to trial as an individual action, the class may still benefit from any injunctive relief which may be granted to Petitioner, assuming, of course, that she proves her right to such relief. Where a court finds evidence of a practice or policy of discrimination, it need not permit its continued application to persons other than the named plaintiff and may issue an appropriately broad injunction.[51] Although Petitioner

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50. Similarly, the District Court's order regarding the scope of permissible discovery is subject to amendment or alteration prior to final judgment.

51. In *Gray v. International Brotherhood of Electrical Workers,* 73 F.R.D. 638, 640 (D. D.C. 1977), the court held that class action treatment of plaintiffs' Title VII claims was unnecessary because, if the individual plaintiffs prevailed on their claims, the court would be required to fashion "an appropriate equitable decree":

> "Such a decree would of course be directed toward the discriminatory practices alleged and would thus afford injunctive relief to all victims of such discrimination, not merely to the plaintiffs bringing this action."

See also, Brito v. Zia Co., 478 F.2d 1200, 1207 (10th Cir. 1973) (affirmed plant-wide injunction against test-

cites several cases for the proposition that an individual plaintiff can obtain only the relief to which he or she is entitled, none of these cases holds that such relief cannot extend to other persons similarly situated.[52]

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ing procedures despite affirmance of class certification denial); *Tipler v. E. I. duPont deNemours & Co.*, 443 F.2d 125, 130 (6th Cir. 1971) (all employees would benefit from employee's complaint seeking general relief against a wide range of discriminatory practices); *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968) (individual suit challenging discriminatory employment practices "is perforce a sort of class action for fellow employees similarly situated"). *Cf. United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974) (affirmed denial of class certification because injunction against discriminatory refusal to extend city water and sewer systems would apply to all persons subject to the practice under attack); *Martinez v. Richardson*, 472 F.2d 1121, 1127 (10th Cir. 1973) (injunction against recoupment of Medicare benefits without a hearing could extend beyond named plaintiffs without use of class action); *Cousins v. City Council of Chicago*, 466 F.2d 830, 845 (7th Cir.), *cert. denied*, 409 U.S. 893 (1972) (individual plaintiffs had standing to challenge racially-motivated gerrymandering regardless of certification of class action); *Bailey v. Patterson*, 323 F.2d 201, 206-07 (5th Cir. 1963), *cert. denied sub nom., City of Jackson v. Bailey*, 376 U.S. 910 (1964) (class action unnecessary since desegregation of facilities would result from appropriate order in individual action).

52. Petitioner's Brief at 32-34. *Sperry Rand Corp. v. Larson*, 554 F.2d 868 (8th Cir. 1977), is not at all in point, the employer's petition for a writ of mandamus having been denied because the district court had not abused its discretion in certifying the class. The named plaintiffs in *Carracter v. Morgan*, 491 F.2d 458 (4th Cir. 1973), were unable to obtain injunctive relief for the uncertified state-wide class of plaintiff's against the uncertified state-wide defendant class of county chain gang

Neither *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), nor *East Texas Motor Freight System, Inc. v. Rodriquez*, 431 U.S. 395 (1977), supports Petitioner's assertion that class-wide relief is only possible in a class action. *Teamsters* is not at all germane, involving a "pattern or practice" action brought by the Government under Section 707(a) of Title VII, 42 U.S.C. § 2000e-6(a)(1970),[53] while in *Rodriquez* class-wide relief was held to be improper because the named plaintiffs had suffered no injury and

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administrators, but they *did* obtain a broad order desegregating the *entire* chain gang system in the county administered by the named defendants. *Washington v. Safeway Corp.*, 467 F.2d 945 (10th Cir. 1972), was a case in which plaintiff's claims were dismissed on the merits after he failed to allege or satisfy the Rule 23 prerequisites to a class action; the opinion says nothing about the scope of relief which could have been granted if plaintiff had prevailed in his individual action.

Danner v. Phillips Petroleum Co., 447 F.2d 159 (5th Cir. 1971), likewise sets no limitations on the possible scope of injunctive relief in an individual action, the district court having been reversed for granting relief to an uncertified class beyond that which in that case was necessary to make plaintiff whole. Furthermore, in *Danner* plaintiff had never advanced a claim on behalf of any class, so it was improper for the district court to consider awarding any relief to a class beyond the relief to which plaintiff was entitled as an individual. By contrast, the district court here, after hearing the merits of the case, could conceivably decide to reverse the class action denial and could then properly grant class-wide injunctive relief.

53. One holding of the *Teamsters* decision is that once a system-wide pattern and practice of discrimination has been proved, each applicant is presumptively entitled to relief unless the employer can demonstrate lawful reasons for his or her rejection.

were not proper representatives of the class they purported to represent.

Petitioner concedes that in certain circumstances "relief granted in favor of the named plaintiff will perforce operate to the benefit of the class", but she asserts that the facts of the instant case preclude such a broad remedial order. [Petitioner's Brief at 34 n. 10]. This assertion is contradicted by Petitioner's repeated allegations in the pleadings and in her brief that what is at issue are overall company policies and practices of discrimination against females. [Complaint, paragraph V. B., A. 10a-11a; Petitioner's Brief at 6]. In view of these contentions concerning general policies and practices which could be enjoined in Petitioner's individual action, the possibility cannot be ruled out that a broad injunction could be issued by the District Court if she prevails at the trial on the merits.

More importantly, however, Petitioner's argument that her appeal should be allowed because *in her particular case* the denial of class certification precludes injunctive relief for the class would create an unworkable standard of appealability under § 1292(a)(1). Following Petitioner's logic, the courts of appeals should review orders denying class certification only when the facts of the case demonstrate that the class cannot benefit from any injunction granted to the named plaintiff. Such a standard would necessarily involve the appellate courts in speculation and conjecture concerning the merits of actions, at a preliminary stage prior to the development of an adequate record, simply for the purpose of determining appealability under § 1292(a)(1). Once it is recognized that not all orders denying class certification will necessarily have the effect of precluding injunctive relief which benefits persons who are members of the putative class, it become impossible to articulate a practical standard for determining when the denial of class action status has the effect of an outright denial of injunctive relief. The effect of a denial of class certification on the scope of injunctive relief cannot reasonably be predicted in advance of a decision on the merits, and until that time, such an order is not appealable under § 1292(a)(1).

3. *Intervention By Members of the Putative Class May Affect the Scope of any Injunctive Relief That Might Ultimately Be Awarded.*

The possibility of intervention by additional plaintiffs is another reason why the denial of class certification does not necessarily have the "effect" of narrowing the scope of injunctive relief which might ultimately be awarded. Where class action status has been denied, members of the putative class may participate in the ongoing lawsuit by filing a petition for intervention pursuant to Fed.R.Civ.P. 24(b). *American Pipe and Construction Co. v. State of Utah,* 414 U.S. 538 (1974); *Miller v. Central Chinchilla Group, Inc.,* 66 F.R.D. 411 (S.D. Iowa 1975); *Barninger v. National Maritime Union,* 372 F.Supp. 908 (S.D.N.Y. 1974); *Hurley v. Van Lare,* 365 F.Supp. 186, 196 n.13 (S.D.N.Y. 1973), *rev'd on other grounds,* 497 F.2d 1208 (2d Cir. 1974), *rev'd,* 421 U.S. 338 (1975) ("permissive intervention is most appropriate where the court has determined a case unsuitable for class action treatment").[54]

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54. The Advisory Committee's Note to Rule 23 states that, after denial of class certification, "the court may still be receptive to interventions before the decision on the merits." 39 F.R.D. 69, 104 (1966).

Members of the putative class can assert their rights by intervening in Petitioner's lawsuit. The pendency of the class action claim would have tolled the running of the statute of limitations.[55] Intervention thus enables members of the rejected class to seek injunctive relief. The denial of class action status does not have the effect of denying them an injunction but simply requires that they personally intervene to seek that relief.[56] Thus, the possibility of intervention in the ongoing lawsuit is yet another reason why the denial of class certification does not inherently limit the scope of injunctive relief which may ultimately be awarded in the action.

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In sum, the order of the District Court does not necessarily have the effect of a denial of injunctive relief to members of the class. The District Court's interlocutory order on the class action question is inherently subject to reconsideration, so this lawsuit could again become a class action prior to any ruling on the request for injunctive relief. Even if the case proceeds as an individual action, the class could possibly benefit from any injunction which Petitioner might obtain, at least insofar as a broad policy or practice of discrimination were proved and enjoined. In any event, individual class members desiring injunctive relief can intervene in Petitioner's lawsuit. The order denying class certification does not inherently preclude members of the putative

55. *American Pipe and Construction Co. v. State of Utah, supra.*

56. *Williams v. Wallace Silversmiths, Inc.,* 566 F.2d 364, 367 (2d Cir. 1977) (per curiam). Rather than intervening, these persons could, of course, choose to institute their own individual lawsuits seeking injunctive relief.

class from obtaining injunctive relief. Hence, no interlocutory appeal of the denial of class action status would be warranted even if the "effect" of an order were controlling for purposes of § 1292(a)(1).

III. No Policy Reasons Justify the Requested Judicial Expansion of §1292(a)(1).

There are no policy reasons which would justify expanding § 1292(a)(1) to allow immediate appeal of an order denying class certification because, as shown below, procedures already exist which can appropriately protect putative class members from an erroneous denial of class certification.

A. CLASS ACTION DETERMINATIONS ARE FULLY REVIEWABLE AFTER FINAL JUDGMENT, EITHER BY NAMED PLAINTIFF OR BY ANY INTERVENORS.

While Petitioner asserts that it is "extremely probable" that the order denying class certification will never be reviewed unless an immediate appeal is allowed,[57] the fact of the matter is that such orders are fully reviewable after final judgment. As the Third Circuit emphasized in the instant case, appeal of a class action determination after final judgment "in no way diminishes the power of the court upon review to afford full relief."[58]

In his concurring opinion, Chief Judge Seitz analyzed the question whether an order denying class certification would be subject to review after final judgment. He determined that if Petitioner should be denied individual relief, "she could, of course, raise the

57. Petitioner's Brief at 49.

58. *Gardner, supra,* 559 F.2d at 212.

district court's failure to certify [a class] along with her other assignments of error on appeal after final judgment."[59] Chief Judge Seitz also determined that Petitioner could obtain review of the class action determination after final judgment even if she obtained all the individual relief requested at trial.[60] The concurring opinion concluded that:

> "[s]ince the district court's refusal to certify will always be appealable after final judgment, it can hardly be said that the court's decision has foreclosed the possibility that the class would ultimately be certified and class-wide relief granted." *Gardner, supra,* 559 F.2d at 219.

It is the rule under 28 U.S.C. § 1291 that appeal can be taken after a final decision on the merits of not only the final judgment but also of the various interlocutory rulings made during the proceedings; the interlocutory rulings, such as a class action determination, merge into the final judgment. *E.g., Williams v. Mumford,* 511 F.2d 363, 366 (D.C. Cir.), *cert. denied,* 423 U.S. 828 (1975). *See also* 9 Moore's Federal Practice, ¶ 110.07 at 107-109 (2d ed. 1975).

This Court acknowledged in *United Airlines Inc. v. McDonald,* 432 U.S. 385, 395 (1977), that a "District Court's refusal to certify [a class] was subject to appellate review after final judgment at the behest of the named plaintiff. . . ." The *McDonald* Court cited numerous appellate decisions that allowed a named plaintiff to appeal after final judgment a refusal to certify a class both where the named plaintiff prevailed on a individual

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59. *Id.,* at 214.

60. *Id.,* at 218-219.

claim and where the named plaintiff lost on an individual claim.[61] There is no question that if Petitioner wishes to appeal the order denying class certification after final judgment, the Third Circuit will review the District Court's decision. *Gardner, supra,* 559 F.2d at 212, 219. *Accord, Gellman v. Westinghouse Electric Corp.,* 556 F.2d 699, 701 (3d Cir. 1977).

Petitioner has erroneously cited this Court's recent decision in *East Texas Motor Freight System, Inc. v. Rodriquez,* 431 U.S. 395 (1977), for the proposition that a named plaintiff would lack standing to appeal an order denying class certification following the loss of his or her individual case.[62] *Rodriquez* simply does not support that proposition.

Rodriquez was a Title VII action where the named plaintiffs tried their individual claims and did not move for class certification until after trial.[63] The Fifth Cir-

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61. *McDonald, supra,* 432 U.S. at 395 n. 14. The Court cited *Galvan v. Levine,* 490 F.2d 1255 (2d Cir. 1973), and *Esplin v. Hirshi,* 402 F.2d 94 (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969), decisions allowing a named plaintiff to appeal the trial court's refusal to certify after having prevailed on an individual claim. The *McDonald* opinion also cited *Zenith Laboratories, Inc. v. Carter-Wallace, Inc.,* 530 F.2d 508 (3d Cir. 1976), *Penn v. San Juan Hospital, Inc.,* 528 F.2d 1181 (10th Cir. 1975), *Bailey v. Ryan Stevedoring Co.,* 528 F.2d 551 (5th Cir. 1976) and *Haynes v. Logan Furniture Mart, Inc.,* 503 F.2d 1161 (7th Cir. 1974), decisions allowing named plaintiffs who were unsuccessful on their individual claims to appeal the trial court's refusal to certify a class.

62. Petitioner's Brief at 46.

63. *Rodriquez, supra,* 431 U.S. at 400. The trial court denied class certification because plaintiffs (i) failed to promptly move for certification, (ii) concentrated on individual claims at trial, (iii) stipulated that

cuit reversed the district court's denial of the post-trial class certification motion, and then itself certified the class and found class-wide liability. This Court vacated the Fifth Circuit's judgment in *Rodriquez* because it was clear, based on that particular record, that the named plaintiffs were not adequate class representatives under Fed.R.Civ.P. 23(a).[64] At no point did the Court hold or even indicate in *Rodriquez* that the issue of class certification was moot because the named plaintiffs had lost their individual claims. In fact, the trial court's class action determination was reviewed by this Court and found to be consistent with Rule 23.[65] The Court did not remand *Rodriquez* with instructions ordering the trial court to dismiss the complaint, as it had done previously when a case was moot,[66] but instead remanded *Rodriquez* for further proceedings. The Fifth Circuit affirmed the trial court on remand. *Rodriquez v. East Texas Motor Freight,* 560 F.2d 1286 (5th Cir. 1977).

After *Rodriquez* was decided, this Court held in *United Air Lines, Inc. v. McDonald, supra,* that a putative class member's intervention to appeal an adverse class determination was timely in an action where the plaintiffs had previously settled their individual claims and a judgment of dismissal had been entered. The hold-

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the only issue to be determined concerned the employer's failure to act on plaintiffs' employment applications and (iv) sought class relief that the alleged class had previouly rejected. The trial court also held against the named plaintiffs on their individual claims.

64. *Rodriquez, supra,* 431 U.S. at 403-405.

65. *Rodriquez, supra,* 431 U.S. at 406.

66. *See, e.g., Indianapolis School Commissioners v. Jacobs,* 420 U.S. 128, 130 (1975).

ing in *McDonald* negates any suggestion that the class determination question was moot in light of the settlement of individual claims, or that the intervenor lacked standing to appeal.[67] Since this Court did not hold the class determination issue in *McDonald* to be moot where the original plaintiff's claims had been settled and dismissed, the instant Petitioner's assertion—that an appeal of the class issue by a plaintiff who has fully litigated a claim to final judgment will somehow be dismissed for lack of standing—is not plausible. And, if a class can be certified after the named plaintiffs settle and dismiss their individual claims, as indicated by *McDonald,* then a class can presumably be subsequently certified after the named plaintiffs lose their individual claims.[68] Thus, contrary to Petitioner's assertion,[69] the failure of an individual claim is not dispositive of the class certification question. Petitioner will be able to obtain review of the denial of class certification regardless of the outcome of her individual lawsuit.

The possibility that the named plaintiff will lack incentive to appeal the adverse class determination if

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67. The Court stated "it would be circular to argue that an unnamed member of the putative class was not a proper party to appeal, on the ground that her interest had been adversely determined by the trial court." *McDonald, supra,* 432 U.S. at 394-95. Moreover, the Court also stated that if the intervenor were successful on review of the order denying class certification, it would result in the certification of a class. *Id.* at 392.

68. It is obvious that a class can subsequently be certified if the denial of the named plaintiff's individual claim is reversed on appeal. *E.g., Haynes v. Logan Furniture Mart, Inc., supra.*

69. Petitioner's Brief at 46.

she obtains a favorable judgment on her individual claim cannot serve to justify the immediate appeal of class action denials. The suggestion that Petitioner may not want to appeal after final judgment,[70] whether out of pure whimsy or for economic reasons, is hardly a policy consideration upon which to base immediate appealability. In any event, it is likely that a named plaintiff would appeal an adverse class determination after favorable final judgment because it might lead to a greater net recovery by reducing the proportion of plaintiff's individual recovery going to his attorney. In fact, the named plaintiffs in several cases have appealed adverse class determinations after prevailing on their individual claims. *E.g., Galvin v. Levine,* 490 F.2d 1255 (2d Cir. 1973); *Esplin v. Hirshi,* 402 F.2d 94 (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969).

But even if somehow a named plaintiff lacked incentive after final judgment to appeal an order denying class certification, the order could still be reviewed. Intervention is available for class members who seek to prosecute a case through the appellate process in hopes of reversing an adverse class determination, if for any reason the original plaintiff cannot or does not appeal. *United Air Lines v. McDonald, supra.* The right to appeal the trial court's refusal to certify a class is not limited to those whose individual claims were determined. If any member of the putative class proceeds in an individual action, *McDonald* indicates that the class certification can be challenged on appeal by named or unnamed members of that class. The *McDonald* decision protects putative class members who wish to intervene even after final judgment to appeal an order

70. Petitioner's Brief at 48.

denying class certification. In *McDonald,* a putative class member intervened for purposes of appealing the class action denial after the individual action had been settled. The intervention was held timely because the motion was filed within the time period in which the named plaintiffs could have taken an appeal.[71] Putative class members who had previously intervened to try their individual claims would presumably also be able to appeal the class action determination after final judgment, since a putative class member in *McDonald* who had not even tried her individual claim had standing to appeal the class determination.

Intervention enables members of the putative class to protect their individual rights as well as their rights as class members. An order denying class certification does not deprive any putative class member of a timely individual claim. As was previously discussed,[72] putative class members can intervene for the purpose of trying their individual claims if class certification is denied. *American Pipe and Construction Co. v. Utah,* 414 U.S. 538 (1974). The Court there made clear that the statute of limitations is tolled prior to an adverse ruling by the trial court upon the class determination motion. Accordingly, intervention is available after the denial of class certification for any putative class members who may want an immediate trial of their individual claims or who may want to be protected in the event

71. *McDonald, supra.,* 432 U.S. at 390.

72. *See* discussion, *supra,* at 51-53.

that the district court's denial of class status is subsequently affirmed.[73]

In sum, expanding §1292(a)(1) to allow immediate appeal of an order denying class certification is certainly not necessary to ensure appellate review of such orders. Class action determinations are fully reviewable after final judgment either at the behest of the named plaintiff or any intervenors.

B. If a Suit Concerns a Situation of Potential Immediate or Irreparable Harm to a Putative Class, Preliminary Injunctive Relief Is Possible Before Class Determination.

The instant action clearly does not involve potential immediate and irreparable harm to a putative class. In fact, Petitioner admitted in her answers to Interrogatories to Plaintiff that her primary motivation in bringing this lawsuit was to secure employment for herself. (A. 121a). Preliminary injunctive relief was neither requested in the Complaint nor sought by Petitioner. Moreover, Petitioner filed an EEOC charge and then waited over three years before filing suit. (A. 16a, 1a). The admission and the lengthy delay in filing suit belie

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73. The Court of Appeals for the Fifth Circuit has recently determined that, where class action status has been denied, intervenors in a Title VII case need not separately exhaust the special statutory prerequisites to suit of filing an EEOC charge and obtaining a right to sue letter if one of the original plaintiffs has satisfied these requirements. *Wheeler v. American Home Products Corp.*, 563 F.2d 1233 (5th Cir. 1977). Under *Wheeler*, if an original plaintiff filed an EEOC charge and received a right to sue notice from the Commission pursuant to 42 U.S.C. §§2000e-5(e), 5(f)(1), putative class members can intervene without exhausting administrative remedies.

Petitioner's representations to this Court that immediate appellate review is necessary because of immediate and irreparable harm to the putative class.[74] If this action truly involved the potential for such harm, Petitioner could have requested a right to sue notice after only 180 days following the filing of the charge and initiated this action two and one-half years before she did. 42 U.S.C. §2000e-5(f)(1). *See, e.g., Tuft v. McDonnell Douglas Corp.*, 517 F.2d 1301, 1307-08 (7th Cir. 1975); *Equal Employment Opportunity Commission v. E. I. duPont de Nemours & Co.*, 516 F.2d 1297, 1300-01 (3rd Cir. 1975).

Where an alleged class action does involve potential immediate and irreparable harm, preliminary injunctive relief is available and should be sought. The denial of a Fed.R.Civ.P. 65 motion for a preliminary injunction is precisely the type of order which can be appealed under §1292(a)(1).

It is well settled that preliminary injunctive relief to protect a putative class can be sought and granted in advance of a ruling as to the maintainability of a class action. *E.g., Lawrence Bicentennial Commission v. City of Appleton, Wisconsin*, 409 F.Supp. 1319, 1327 (E.D. Wis. 1976); *Chance v. Board of Examiners*, 330 F.Supp. 203, 206 n. 8 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167, 1169 n. 2 (2d Cir. 1972).[75] This Court has acknowledged the

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74. Petitioner's Brief at 44.

75. In other cases courts have granted classwide preliminary injunctive relief without any mention of the class certification question. *E.g., Swansey v. Elrod*, 386 F.Supp. 1138 (N.D. Ill. 1975); *Negron v. Preiser*, 382 F.Supp. 535 (S.D.N.Y. 1974); *Salandich v. Milwaukee County*, 351 F.Supp. 767 (E.D.Wis. 1972).

propriety of a preliminary injunction in advance of class certification in *Elrod v. Burns*, 427 U.S. 347, 373 (1976). There, the Court affirmed the Seventh Circuit's directive[76] that the district court issue a preliminary injunction which it had previously denied and then determine the appropriateness of the class action.[77] Thus, in the situations where potential immediate and irreparable harm to a putative class exists, the named plaintiff need only file a Rule 65 motion for preliminary injunctive relief.

Both Petitioner and Judge Gibbons in his dissent on the denial of rehearing en banc have suggested that immediate appeal of all class action denials is necessary because a district court judge may be "unfavorably disposed"[78] or inhospitable[79] to class actions or certain areas of the law. It should be pointed out that the hypothetical situation posed by Judge Gibbons—that an "unfavorably disposed" district court judge might try to shield his unwillingness to grant *pendente lite* relief behind an adverse class determination—is not really presented in this case because no motion for preliminary injunctive relief was ever filed or heard in the District Court. Thus, this case does not concern the questions which might be involved in an appeal taken from a ruling upon a motion for a preliminary injunction heard by a district court after the denial of class action status. Regardless of whether, in some circumstances, an appellate court might have jurisdiction under §1292(a)(1) to consider certain aspects of an adverse class determination in connection with an appeal from a subsequent trial court decision upon a motion for preliminary injunction, there was no such jurisdiction in the instant case in the Third Circuit and this issue is not presently before this Court.

76. *Burns v. Elrod*, 509 F.2d 1133, 1136-37 (7th Cir. 1975).
77. *Elrod, supra*, 427 U.S. at 373.
78. *Gardner, supra*, 559 F.2d at 222.
79. Petitioner's Brief at 52.

In any event, we respectfully submit that it is not appropriate to distort the rules on appealability based on the assumption that district court judges will act in a duplicitous manner or otherwise abuse their authority. Moreover, a trial court cannot shield the denial of preliminary injunctive relief from appellate review if the named plaintiff promptly moves for such relief. In the exceptional situation where immediate injunctive relief for a class is allegedly needed, the proper course of action for a plaintiff is to request a Rule 65 hearing immediately upon filing the complaint. Where preliminary injunctive relief is sought immediately after the filing of the action, the trial court cannot delay its decision or refuse to act because that in itself is appealable as the denial of injunctive relief. *E.g., Cedar Coal Co. v. United Mine Workers*, 560 F.2d 1153, 1161 (4th Cir. 1977); *United States v. Lind*, 301 F.2d 818, 822 (5th Cir. 1962), *cert. denied*, 371 U.S. 893 (1962).[80]

80. In a situation where preliminary injunctive relief is necessary and a Rule 65 motion has been filed, it would be virtually impossible for even the hypothetical inhospitable trial judge to accelerate a class action determination so as to deny a class, and then deny a preliminary injunction because of the adverse class determination, since plaintiffs typically have several months within which to move and brief the class certification question. But if a trial court somehow cut short the class certification proceedings simply for the purpose of arbitrarily denying class-wide *pendente lite* relief, the appellate court would have the power to correct the situation under the All Writs Act through use of man-

In sum, a general rule on the appealability of class action denials should not be shaped on the basis of highly unlikely hypotheticals or upon the assumption that the federal trial bench would act in a duplicitous manner. This is particularly true since there are already sufficient safeguards, such as preliminary injunctive relief and mandamus, to protect putative class members from potential immediate and irreparable harm in an extraordinary situation.

C. In Appropriate Circumstances, Immediate Review of Adverse Class Determinations Can Be Obtained Under §1292(b) or the All Writs Act.

Petitioner claims that appealability under §1292(a)(1) should be extended to interlocutory orders denying class action status in order to avoid alleged serious harm to members of the putative class.[81] Assuming *arguendo* that such harm might in fact take place, it does not follow that the narrow confines of §1292(a)(1) should be expanded to provide immediate appellate review of adverse class determination orders. There are alternative, and arguably preferable, means available to obtain immediate review of such interlocutory orders in appropriate circumstances.

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damus proceedings, 28 U.S.C. §1651. *See* discussion, *infra*, at 67. Therefore, a rule that orders denying class certification are not appealable under §1292(a)(1) hardly allows an unfavorably disposed district court judge "to shield from appellate review his unwillingness to grant *pendente lite* relief to the class." *Gardner, supra*, 559 F.2d at 222 (Gibbons, J., dissenting from the denial of rehearing en banc).

81. Petitioner's Brief at 43 et seq.

It should be pointed out that Petitioner did not even attempt to have the denial of class action status in the instant case certified for appeal under 28 U.S.C. §1292(b). The federal courts of appeals, including the Third Circuit, have entertained appeals from class action determination orders under §1292(b). *E.g., Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3rd Cir. 1974) (en banc), *cert. denied*, 419 U.S. 885 (1974); *Wilcox v. Commerce Bank of Kansas City*, 474 F.2d 336 (10th Cir. 1973); *Zahn v. International Paper Co.*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969).[82]

The Third Circuit has held that §1292(b) is the proper means to obtain interlocutory appeal of such orders. *Gardner, supra*, 559 F.2d at 211 n. 3; *Katz, supra*, 496 F.2d at 752. The Second Circuit in *Parkinson v. April Industries, Inc.*, 520 F.2d 650, 655 n. 5 (2d Cir. 1975), has stated that "this method [1292(b)] is obviously the most efficient way of securing interlocutory appellate adjudication, and perhaps should be the only way by which a class action designation issue could interlocutorily reach an appellate court." The advantages of the discretionary nature of appealability under §1292(b) were succinctly explained in the following manner by a report to the Judicial Conference of the Tenth Circuit which is included in the legislative history of this statute:

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82. The commentators agree that class determination orders should be appealable under §1292(b). *E.g.*, Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 390 n. 131 (1967); *Report of the American Bar Association Special Committee on Federal Rules of Procedure*, 38 F.R.D. 95, 104-105 (1965).

> "Requirement that the Trial Court certify the case as appropriate serves the double purpose of providing the Appellate Court with the best informed opinion that immediate review is of value and at once protects appellate dockets against a flood of petitions in inappropriate cases." S. Rep. No. 2434, 85th Cong., 2d Sess., 15 (1958), *reprinted in* [1958] 3 U.S. CODE CONG & AD. NEWS 5262.

The availability of §1292(b) "removes any incentive to enlarge by a liberal construction the class of orders appealable under section 1292(a)." *Cord v. Smith,* 338 F.2d 516, 521 (9th Cir. 1964). *Accord, Chappel & Co. v. Frankel,* 367 F.2d 197, 204 (2d Cir. 1966) (en banc). Section 1292(b) provides, in appropriate circumstances, an avenue for immediate discretionary review of interlocutory orders and, at the same time, protects the appellate courts from a flood of frivolous appeals. Section 1292(b) was enacted a few years after, and doubtless in response to, this Court's decision in *Baltimore Contractors.* In providing a procedure for interlocutory appeals it is noteworthy that Congress selected a process allowing discretionary interlocutory appeals rather than expanding the situations where an interlocutory appeal is obtainable as of right.[83]

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83. The Third Circuit in *Hackett v. General Host Corp.,* 455 F.2d 618, 624 (3rd Cir.), *cert. denied,* 407 U.S. 925 (1972), observed that mandamus is available as a remedy in situations of possible arbitrary refusal by a trial court to certify a question for appeal under §1292(b):

> "We have had no indication that the district courts of this circuit will reject applications under §1292(b) . . . arbitrarily . . . . If in isolated instances arbitrariness creeps in, there remains the ultimate remedy of mandamus." (citations omitted).

Thus, §1292(b) affords the opportunity to immediately appeal orders denying class certification in situations involving controlling questions of law where prompt review will materially advance the litigation. There is, therefore, no need to strain the interpretation of §1292(a)(1) and allow a flood of piecemeal appeals since there already is an adequate method for seeking review of such interlocutory orders.

Moreover, there is no reason to expand §1292(a)(1) for the purpose of dealing with the rare trial court that is truly unfavorably disposed to class actions. The writ of mandamus is available for such isolated situations. *See, e.g., Anschul v. Sitmar Cruises, Inc.,* 544 F.2d 1364, 1368 n. 5 (7th Cir.), *cert. denied,* 429 U.S. 907 (1976); *Parkinson v. April Industries, Inc.,* 520 F.2d 650, 660 (2d Cir. 1975) (Friendly, J., concurring); *Hackett v. General Host Corp.,* 455 F.2d 618, 624 (3d Cir.), *cert. denied,* 407 U.S. 925 (1972). The All Writs Act, not §1292(a)(1), is the means by which courts of appeals exercise supervisory control over the district courts in exceptional circumstances. *LaBuy v. Howes Leather Co.,* 352 U.S. 249, 259-260 (1957). The writ of mandamus is appropriately issued where there is usurpation of judicial power or a clear abuse of discretion. *Schlagenhauf v. Holder,* 379 U.S. 104, 110 (1964).

* * *

There are, therefore, no sound reasons to expand §1292(a)(1) and allow piecemeal review as urged by Petitioner.[84] The availability of intervention, review of the class determination after final judgment, preliminary injunctive relief, interlocutory appeal under §1292(b) and the writ of mandamus combine to fully protect putative class members from the effect of a wholly erroneous class action denial. And, while additional pro-

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84. Petitioner's Brief at 40 n. 13 presumably suggests that, if the Court rules against her on the question concerning which the writ of certiorari was granted, it should consider the appealability of the order denying class certification pursuant to §1291. [Petitioner cites §1292(a)(1) but it is presumed from the context that §1291 is intended.] Petitioner's request is improper and should be disregarded by the Court.

The sole question presented for review in the Petition for Certiorari is the appealability of the order under §1292(a)(1). The Petition contained no reference to any question of appealability under §1291, nor was that section even cited therein. Furthermore, the question of appealability under §1291 was neither raised nor passed upon in the Court of Appeals.

Rule 23.1(c) of the Rules of the Supreme Court provides that "[o]nly the questions set forth in the petition [for certiorari] or fairly comprised therein will be

ceedings may be necessary in the trial court if an order denying class action status is reversed after final judgment, that delay will probably be no greater, and may be less, than that caused by the immediate appeal of a class action determination order.

The present case has already been delayed two years by Petitioner's attempted interlocutory appeal. If she had tried her individual action—which would not have taken a great deal of time—and had appealed after final judgment, the Third Circuit might have already reviewed the adverse class determination.

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considered by the court." Review is thus limited to questions specifically raised in the petition for certiorari; questions not mentioned in the petition are not properly before the Court for consideration. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 374 n. 60 (1977); *Andrews v. Louisville & Nashville R. Co.,* 406 U.S. 320, 324-25 (1972); *Irvine v. California,* 347 U.S. 128, 129-30 (1954); *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board,* 301 U.S. 142, 146 n. 4 (1937). Further, the question of the applicability of §1291 in this case was not raised before the Third Circuit. This Court has consistently refused to pass upon issues which were raised neither in the court of appeals nor in the petition for certiorari. *E.g., Federal Trade Commission v. Simplicity Pattern Co.,* 360 U.S. 55, 61-62 n. 4 (1959); *Lawn v. United States,* 355 U.S. 339, 362-63 n. 16 (1958).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals for the Third Circuit dismissing the appeal from the District Court's order denying class certification should be affirmed.

Respectfully submitted,

LEONARD L. SCHEINHOLTZ
WALTER P. DEFOREST
PETER D. POST
KEVIN P. LUCAS
JEFF L. LEWIN
Reed Smith Shaw & McClay
747 Union Trust Building
Pittsburgh, Pennsylvania 15219

WENDELL G. FREELAND
RICHARD F. KRONZ
JOSEPH F. GROCHMAL
Freeland & Kronz
409 Plaza Building
Pittsburgh, Pennsylvania 15219

Counsel for Respondent
Westinghouse Broadcasting Company

Of Counsel:
STUART I. SALTMAN
Westinghouse Electric Corporation
Gateway Center
Pittsburgh, Pennsylvania 15222

March 4, 1977

ADDENDUM A

FED.R.CIV.P. 23. CLASS ACTIONS

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-560

JO ANN EVANS GARDNER,
Petitioner,

v.

WESTINGHOUSE BROADCASTING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

ROBERT E. WILLIAMS
DOUGLAS S. McDOWELL
McGUINESS & WILLIAMS
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

AUTHORITIES CITED

AUTHORITIES CITED—Continued

AUTHORITIES CITED—Continued

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MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Equal Employment Advisory Council (hereafter EEAC) moves this Court for leave to file the accompanying brief as *Amicus Curiae* in support of the respondent in this case, Westinghouse Broadcasting

Company. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary nonprofit association organized as a corporation under the laws of the District of Columbia to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations whose employer-members have a common interest in the foregoing purpose. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

2. Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*) as well as other equal employment statutes and regulations. As such, they have a direct interest in the issue presented for the Court's consideration in the instant case—i.e., whether the denial of a class action certification in a Title VII action seeking monetary, injunctive and other relief is immediately appealable as of right under 28 U.S.C. § 1292(a)(1) as an order refusing an injunction.

3. Because of its interest in issues pertaining to equal employment, EEAC has sought and been granted permission by this Court to file briefs as *Amicus Curiae* in a number of other recent cases raising serious Title VII issues. *See e.g., Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 14 FEP Cases 1514 (1977); *East Texas Motor Freight* v. *Rodriguez*, 431 U.S. 395, 14 FEP Cases 1505 (1977); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 14 FEP Cases 1510 (1977); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 14 FEP Cases 1697 (1977).

4. EEAC and its members have broad knowledge concerning the type of Title VII and class action issues involved here. Because of this knowledge and its extensive experience as *amicus curiae* in other Title VII cases, EEAC is well situated to brief this Court on the practical as well as legal aspects of the issue presented here.

5. Counsel for Westinghouse Broadcasting Company have informed the movant that they have no objection to the granting of this motion. EEAC's brief *amicus curiae* agrees with Westinghouse that the decision of the court below should be affirmed.

WHEREFORE, it is respectfully moved that the EEAC be granted leave to file the accompanying brief *Amicus Curiae* in this case.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
Counsel for the *Amicus Curiae*
Equal Employment Advisory Council

MCGUINESS & WILLIAMS
1747 Pennsylvania Ave., N.W.
Suite 1250
Washington, D.C. 20006
(202) 296-0333

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

STATEMENT OF THE CASE

Petitioner Gardner initiated a class action under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*) alleging that her rejection for employment with Westinghouse Broadcasting Company was predicated upon company-wide policies which discriminated on the basis of sex. She sought mone-

tary and permanent injunctive relief in behalf of herself and a broadly-defined class of female exployees and female applicants for employment. No injunctive relief *pendente lite* was requested. The district court refused to certify the proceeding as a class action on the basis that the requirements of Fed. R. Civ. P. 23(a) had not been met.

Without first seeking a certificate of appealability under 28 U.S.C. § 1292(b) (1970), petitioner filed an interlocutory appeal from the order of the district court. She claimed that in view of her request for injunctive relief the court's refusal to certify the class was tantamount to a refusal to issue an injunction and therefore appealable, as of right, under 28 U.S.C. § 1292(a)(1) (1970). On appeal, the Third Circuit concluded that § 1292(a)(1) was inapplicable since the district court ruling was merely a procedural order, review of which could await final judgment without generating serious and irremediable consequences. In addition, the court noted that the appropriate avenue for interlocutory review of class action determinations in the Third Circuit was through appellate court approval of a § 1292(b) certificate.

QUESTION PRESENTED

Is the denial of class certification in a Title VII action in which injunctive relief is being sought immediately appealable, as of right, under 28 U.S.C. § 1292(a)(1) (1970) as an order refusing an injunction?

SUMMARY OF ARGUMENT

The injunction exception to the final judgment rule established in 28 U.S.C. § 1292(a)(1) is a narrow one intended to permit litigants to challenge interlocutory orders of "serious, perhaps irreparable consequence." *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 181 (1955). Procedural orders affecting the scope of available injunctive relief which do not touch upon the merits of a plantiff's claim, but rather determine the manner in which the litigation shall proceed, do not generate irreparable consequences appealable under § 1292(a)(1). *Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966). Even if Plaintiff on appeal were to obtain a reversal of the district court's denial of class certification, no injunction would issue at that time. Rather, the case would be returned to the district court for trial. Remedial issues, such as injunctive relief, would not be addressed until the trial on the merits was completed. Thus, the denial of a class action certification is merely a procedural determination that the trial shall proceed on an individual rather than on a class basis, and as such is a mere practice order not falling within the narrow § 1292(a)(1) exception to the final judgment rule.

Expanding the scope of § 1292(a)(1) would also invite numerous piecemeal appeals in class action cases. Since appeals under that provision are a matter of right, the federal courts would have absolutely no authority to screen out nonmeritorious claims. The discretionary control over interlocutory appeals which the federal courts were afforded through en-

actment of § 1292(b) would be effectively negated in class action cases by an avalanche of § 1292(a)(1) appeals.

ARGUMENT

I. 28 U.S.C. § 1292(a)(1) Was Never Intended To Encompass Practice Orders Such As Denials Of Class Action Certifications.

A. *28 U.S.C. § 1292(a)(1) Is Intended To Avoid Irreparable Harm.*

Section 22 of the Judiciary Act of 1789, 1 Stat. 73, 84 (1789), provided that appeals in civil actions could be taken to the circuit courts only from final decrees and judgments. In the Evarts Act of 1891, 26 Stat. 828 (1891), the sole exception to the final judgment rule was "where, upon a hearing in equity . . . an injunction shall be granted or continued by an interlocutory order or decree. . . ." Four years later this exception was broadened to include cases in which injunctions were refused or dissolved or in which applications to dissolve injunctions were refused. 28 Stat. 666-667 (1895). Additions to the class of appealable interlocutory orders were made from time to time until enactment of § 1292 in its present form.[1] From the very outset this Court in-

[1] 28 U.S.C. § 1292(a)(1) (1970) provides:

> (a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

terpreted the injunction exception to the final judgment rule as reflecting a Congressional desire to "permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc.* v. *Bodinger, supra; see, Smith* v. *Vulcan Iron Works*, 165 U.S. 518, 525 (1897); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545 (1949).

B. *Mere Practice Orders Are Not Appealable Under 28 U.S.C. § 1292(a)(1).*

Practice orders—i.e., those which do not relate to the merits of the case but rather merely determine the manner in which the litigation shall proceed—generally do not have a final and irreparable effect on the rights of the parties. Accordingly, even when such orders arguably circumscribe the scope of injunctive relief sought they are not appealable under § 1292(a)(1).

In *Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc., supra*, plaintiff sought a permanent injunction and damages for trademark infringement. When the district court denied plaintiff's motion for summary judgment, he contended that the denial amounted to a denial of an injunction and was therefore appealable under § 1292(a)(1). This Court ruled that the order could not be appealed because it:

> [d]oes not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing—that the case should go to trial. Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view "interlocutory" within the meaning of § 1292(a)(1). We see no other way to protect the integrity of the congressional policy against piecemeal appeals. [385 U.S. at 25].

Accord, Goldstein v. *Cox*, 396 U.S. 471, 475 (1970); *Morganstern Chemical Co.* v. *Schering Corporation*, 181 F.2d 160, 162-163 (3rd Cir. 1950). Similarly, in *Baltimore Contractors, Inc., supra*, this Court held that an order refusing to stay an action pending arbitration was not appealable under the predecessor to § 1292(a)(1) because the ruling constituted merely "a step in controlling the litigation before the trial court, not the refusal of an interlocutory injunction." 348 U.S. at 185. Finally, in *National Machinery Co.* v. *Waterbury Farrel Foundry & Machine Co.*, 290 F.2d 527 (2d Cir. 1961), the district court refused to permit the defendant to assert permissive counterclaims seeking injunctive relief. The court reasoned that such claims would unfairly prejudice the plaintiff in getting its case to trial. The Second Circuit declined to entertain defendant's appeal under § 1292(a)(1) concluding that whenever a refusal to broaden an action to include a claim for an injunction is based neither on the merits nor on an alleged lack of jurisdiction but rather "on the wisdom of consolidating certain claims for trial," it is "not the kind of refusal of an injunction which permits interlocutory review by the Court of Appeals under 28 U.S.C. § 1292(a)(1)." 290 F.2d at 528. *See also,*

Stewart-Warner Corporation v. *Westinghouse Electric Corporation*, 325 F.2d 822, 828-830 (2d Cir. 1963) (Friendly, J., dissenting), *cert. denied*, 376 U.S. 944 (1964). Accordingly, discretionary practice orders which are designed to avoid undue delay or confusion in the course of a particular trial do not generate the requisite adverse consequences for a § 1292(a)(1) interlocutory appeal.

C. *A Refusal To Issue A Class Action Certification Constitutes A Practice Order, Not A Denial Of An Injunction.*

Those courts which have concluded that refusals to certify a class may be appealed as denials of injunctive relief [2] have simply ignored the fact that class action determinations are strictly procedural in nature—they merely determine the parties to the action without expressing any judgment as to either the merits of the case or the appropriateness of injunctive relief. *Williams* v. *Mumford*, 511 F.2d 363, 370, 10 FEP Cases 487, 492 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 828 (1975); *City of New York* v. *International Pipe and Ceramics Corporation*, 410 F.2d 295, 300 (2d Cir. 1969). A determination as to whether a trial shall proceed on an individual or on a class basis is discretionary with the trial court and is subject to alteration or amendment at any time prior to final judgment. Fed. R. Civ. P. 23(c)(1). If after a judgment on the merits the relief

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[2] *Yaffe* v. *Powers*, 454 F.2d 1362 (1st Cir. 1972); *Brunson* v. *Board of Trustees*, 311 F.2d 107 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963); *Jones* v. *Diamond*, 519 F.2d 1090 (5th Cir. 1975); *Price* v. *Lucky Stores, Inc.*, 501 F.2d 1177, 8 FEP Cases 613 (9th Cir. 1974).

granted is deemed insufficient, the class action determination is fully reviewable.

Most importantly, however, class action determinations in no way touch upon the merits of either the individual plaintiff's claim or those of absent class members. The district court in the instant case has merely determined that the claim of Jo Ann Evans Gardner and those of the alleged class members are sufficiently different that consolidation of the claims for purposes of a single trial would not constitute a wise expenditure of judicial resources. This is strictly a procedural determination. Both the procedural nature of class action determinations and the absence of a nexus between refusals to certify and the merits of requests for injunctive relief is highlighted by the fact that were a § 1292(a)(1) appeal allowed and the district court's refusal to certify reversed, the remedy would not be the automatic granting of the permanent injunctive relief sought by Gardner but merely a remand with instructions that the case proceed as a class action. *E.g.*, *Brunson* v. *Board of Trustees*, *supra* at 109; *Price* v. *Lucky Stores Inc.*, *supra*, 501 F.2d at 1179-1180, 8 FEP Cases at 614. Accordingly, to authorize § 1292(a)(1) appeals from refusals to issue class action certifications would, in the words of Judge Friendly in *Stewart-Warner Corporation* v. *Westinghouse Electric Corp.*, *supra* at 829 (dissenting op.):

> [e]xpand a narrow exception to the final judgment rule, intended for cases of true hardship, to include mere practice orders simply because a pleading contains the talismanic word "injunction". . . .

II. Interlocutory Review Of Denials Of Class Action Certifications Should Be Available Only At The Discretion Of The Courts Under 28 U.S.C. § 1292(b).

There are policy as well as statutory reasons why 28 U.S.C. § 1292(a)(1) (1970) should not be extended to encompass denials of class action certifications whenever injunctive relief is sought. This Court has long recognized that numerous considerations must be balanced in determining questions of appealability, "[t]he most important of which are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-153 (1964).

Providing individual plaintiffs who have been denied class action certifications with § 1292(a)(1) appeal privileges will tip the scales heavily in favor of piecemeal review. Since § 1292(a)(1) constitutes a statutory exception to the final judgment rule, aggrieved plaintiffs would be afforded a guaranteed avenue of appeal irrespective of the complexity of the issues involved or the relative merit of their claims. At the same time the courts would be deprived of any discretionary authority to filter out those appeals which do not warrant the expenditure of judicial resources. Merely by incorporating a prayer for injunctive relief into a class action complaint, plaintiffs would be assured of a basis for interlocutory appeal of even the most routine adverse class action determination.

The inconvenience and costs attendant upon such § 1292(a)(1) appeals cannot be justified on the basis

that their foreclosure would result in irreparable harm to aggrieved plaintiffs or absent members of the purported class.[3] As noted earlier, orders refusing to certify class actions are procedural rulings which do not touch upon the merits of either the individual plaintiff's claim or those of the purported class.[4] *Williams* v. *Mumford, supra*, 511 F.2d at 370, 10 FEP Cases at 492; *City of New York* v. *International Pipe and Ceramics Corp., supra* at 300. More importantly, however, 28 U.S.C. § 1292(b) (1970),[5]

[3] This is particularly true in the instant case in view of the absence at a request for injunctive relief *pendente lite*.

[4] Contrary to the implication in Petitioner's brief, denial of an immediate interlocutory appeal will not effectively place the court's order beyond appellate review. Should Gardner lose her individual claim, the district court's refusal to certify the class could be included with her other assignments of error on appeal. *United Air Lines* v. *McDonald*, 97 S. Ct. 2464, 2469, 14 FEP Cases 1711, 1714 (1977). On the other hand, if Gardner were to prevail on her individual claim, she could still appeal the adverse class determination for the reasons described by Chief Judge Seitz in his concurring opinion below. Moreover, should Gardner elect not to appeal the class action ruling, or should class members be reluctant to rely upon Gardner as their class representative in light of her individual recovery, any class member could intervene for purposes of appealing the district court's order. *Id.* at 97 S. Ct. 2471, 14 FEP Cases 1715. And as Chief Judge Seitz noted, Rule 23(d)(2), F.R. Civ. P., allows the district court to issue any protective order and notice necessary to safeguard the interests of alleged class members when class certification is denied to a particular plaintiff.

[5] 28 U.S.C. § 1292(b) (1970) provides: When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

provides a more realistic and judicially manageable avenue of appeal for those infrequent situations in which either the interests of the parties or the orderly administration of judicial time mandate interlocutory review of class action determinations.

Section 1292(b) creates a double discretionary procedure for establishing appellate jurisdiction over interlocutory orders. Trial judges may certify for appeal any order which in their judgment involves a controlling question of law as to which there is substantial ground for difference of opinion and immediate appeal of which may materially advance the ultimate termination of the litigation. Certified orders are then screened by the appellate courts which have the discretion to accept or reject the appeals. The drafters of Fed. R. Civ. P. 23 clearly anticipated the use of § 1292(b) to review class action determinations. *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 390 n. 131 (1967); *Report of the American Bar Association Special Committee on Federal Rules of Procedure*, 38 F.R.D. 95, 104-105 (1965). Several courts have entertained § 1292(b) certifi-

cates with respect to orders both granting and denying class action certifications.[6]

A primary advantage which § 1292(b) offers over § 1292(a)(1) is judicial manageability. Section 1292(b) is "a judge-sought, judge-made, judge-sponsored enactment." *Hadjipateras* v. *Pacifica*, 290 F.2d 697, 702 (5th Cir. 1961). It represents a response to the need for a mechanism which will, in appropriate cases, avoid the harshness of the final judgment rule without falling prey to the very vice which would accompany a liberalization of § 1292(a)(1)—namely, opening the door to frivolous, dilatory, or harrassing interlocutory appeals requiring undue consumption of appellate court time. *See* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 610 (1975). As stated in *Hadjipateras* v. *Pacifica*, *supra* at 703, § 1292(b) was intended:

> [T]o give the appellate machinery of § 1291 through § 1294 a considerable flexibility operating under the immediate, sole and broad control of judges so that within reasonable limits disadvantages of piecemeal and final judgment appeals might both be avoided.

The availability of § 1292(b) for cases in which novel or controversial questions are at issue alleviates

[6] *Katz* v. *Carte Blanche Corporation*, 496 F.2d 747, 752-756 (3d Cir. 1974), *cert. denied*, 419 U.S. 885 (1974); *Wilcox* v. *Commerce Bank of Kansas City*, 474 F.2d 336, 339 (10th Cir. 1973); *Zahn* v. *International Paper Co.*, 469 F.2d 1033, 1034 (2d Cir. 1972), *aff'd.*, 414 U.S. 291 (1973); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1123 (5th Cir. 1969); *cf. Anschul* v. *Sitmar Cruises, Inc.*, 544 F.2d 1364, 1368-1369 (7th Cir. 1976), *cert. denied*, 429 U.S. 907 (1976).

the need for the strained interpretation of § 1292(a)(1) urged by Petitioner in this case.[7] As stated by the Ninth Circuit in *Cord* v. *Smith*, 338 F.2d 516, 521 (9th Cir. 1964):

> [T]he principal purpose of section 1292(b) is to permit appeals, with the concurrence of the trial court and the court of appeals, from interlocutory orders not appealable under section 1292(a). But the *existence of this method of appeal also removes any incentive to enlarge by a liberal construction the class of orders appealable under section 1292(a)*. (Emphasis supplied)

Thus, although § 1292(b), mandamus, and Rule 54(b) may be available in appropriate cases to provide interlocutory review of refusals to certify class actions, the Third Circuit has properly concluded that § 1292(a)(1) does not authorize such appeals. This conclusion is sound not only from the standpoint of statutory interpretation, but from the standpoint of efficient judicial administration of class action litigation as well. It is a conclusion deserving of affirmance by this Court.

[7] Similarly, the more limited appeal rights available under a Fed. R. Civ. P. 54(b) certificate, *e.g.*, *Hayes* v. *Sealtest Foods Division of National Dairy Products Corporation*, 396 F.2d 448, 449 (3rd. Cir. 1968), or in a 28 U.S.C. § 1651(a) (1970) mandamus action, *e.g.*, *McDonnell Douglas Corp.* v. *United States District Court*, 20 F.R. Serv. 2d 11 (9th Cir. 1975), should also relieve the pressure for an expansive interpretation of § 1292(a)(1).

CONCLUSION

For the foregoing reasons, the Equal Employment Advisory Council respectfully submits that the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
MCGUINESS & WILLIAMS
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006

February, 1978